sion.[46] As to the government's interests, the D.C. Circuit found, where submission of the information is "compelled" by the government the interest protected by nondisclosure is that of ensuring the continued reliability of the information.[47] On the other hand, it concluded, where information is submitted on a "voluntary" basis, the governmental interest protected by nondisclosure is that of ensuring the continued and full availability of the information.[48]

The D.C. Circuit found that this same dichotomy between compelled and voluntary submissions applies to the submitter's interests as well: Where submission of information is compelled, the harm to the submitter's interest is the "commercial disadvantage" that is recognized under the National Parks "competitive injury" prong.[49] Where information is volunteered, on the other hand, the exemption recognizes a different interest of the submitter--that of protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained.'"[50]

Having delineated these various interests that are protected by Exemption 4, the D.C. Circuit then noted that the Supreme Court had "encouraged the development of categorical rules" in FOIA cases "whenever a particular set of facts will lead to a generally predictable application."[51] The court found that the circumstances of the Critical Mass case--which involved voluntarily submitted reports--lent themselves to such "categorical" treatment.[52]

Accordingly, the D.C. Circuit held that it was reaffirming the National Parks test for "determining the confidentiality of information submitted under compulsion," but was announcing a categorical rule for the protection of information provided on a voluntary basis.[53] It declared that such voluntarily provided information is "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[54] It also emphasized that this categorical test for voluntarily submitted information is "objective" and that the agency invoking it

---

[46] Id.

[47] Id. at 878.

[48] Id.

[49] Id.

[50] Id. (citing Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)).

[51] Id. at 879 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)).

[52] Id.

[53] Id.

[54] Id.

"must meet the burden of proving the provider's custom."[55]

Applying this test to the information at issue in the Critical Mass case, the D.C. Circuit agreed with the district court's conclusion that the reports were commercial in nature, that they were provided to the agency on a voluntary basis, and that the submitter did not customarily release them to the public.[56] Thus, the reports were found to be confidential and exempt from disclosure under this new test for Exemption 4.[57]

The D.C. Circuit concluded its opinion by observing the objection raised by the requester in the case that the new test announced by the court "may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel."[58] The court dismissed this objection on the grounds that there is "no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act" and that it did not "see any reason to interfere" with an agency's "exercise of its own discretion in determining how it can best secure the information it needs."[59]

Applying Critical Mass

The pivotal issue that has arisen as a result of the decision in Critical Mass,[60] is the distinction that the court drew between information "required" to be submitted to an agency and information provided "voluntarily." Although the Court of Appeals for the District of Columbia Circuit never expressly articulated a definition of these two terms in its opinion in Critical Mass, the De-

---

[55] Id.

[56] Id. at 880 (citing first district court decision and first panel decision in Critical Mass, which recognized that submitter made reports available on confidential basis to individuals and organizations involved in nuclear power production process pursuant to explicit nondisclosure policy).

[57] Id.; see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (applying newly established Critical Mass test and holding that voluntarily submitted information properly withheld because it had been "amply demonstrated" that it would not be customarily released to public) (appeal pending).

[58] 975 F.2d at 880.

[59] Id.; see Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (based upon this holding in Critical Mass, court found that there was "nothing" it could do, "however much it might be inclined to do so," to upset agency regulations that permitted regulated entities to keep documents "on-site," outside possession of agency, and thus unreachable under FOIA) (non-FOIA case brought under Administrative Procedure Act).

[60] 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

partment of Justice has issued policy guidance on this subject based upon an extensive analysis of the underlying rationale of the D.C. Circuit's decision, as well as several other indications of the court's intent.[61] It has concluded that a submitter's voluntary participation in an activity--such as seeking a government contract or applying for a grant or a loan--does not govern whether any submissions made in connection with that activity are likewise "voluntary."[62] Rather than examining the nature of a submitter's participation in an activity, agencies are advised to focus on whether submission of the information at issue was required by those who chose to participate.[63] The Department of Justice's policy guidance on Critical Mass also points out that information can be "required" to be submitted by a broad range of legal authorities, including informal mandates that call for submission as a condition of doing business with the government.[64] Furthermore, the existence of agency authority to require submission of information does not automatically mean such a submission is "required"; the agency authority must actually be exercised in order for a particular submission to be deemed "required."[65]

There has been only one case decided thus far that contains any detailed analysis of the Critical Mass distinction between "voluntary" and "required" submissions.[66] In that case, involving an application for approval to transfer a contract, the court found that the submission had been required both by the agency's statute--which did not, on its face, apply to the submission at issue, but was found to apply based upon the agency's longstanding practice of interpreting the statute more broadly--and by the agency's letter to the submitters which required them to "submit the documents as a condition necessary to receiving approval of their application."[67] Using the same approach as the Department of Justice's Critical Mass guidance, the court specifically held that "[u]nder Critical Mass, submissions that are required to realize the benefits of a voluntary program are to be considered mandatory."[68]

---

[61] See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[62] Id. at 5.

[63] Id.; see also id. at 1 (pointing to significance of this guidance to procurement process and to its development in coordination with the Office of Federal Procurement Policy).

[64] Id.; accord Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission "compelled" both by agency statute and by agency letter sent to submitters) (reverse FOIA suit).

[65] FOIA Update, Spring 1993, at 5; accord Government Accountability Project v. NRC, No. 86-1976, slip op. at 12 (D.D.C. July 2, 1993) (dicta).

[66] See Lykes Bros. S.S. Co. v. Pena, slip op. at 7-11.

[67] Id. at 9.

[68] Id.; accord FOIA Update, Spring 1993, at 3-5.

There have been five other cases decided subsequent to Critical Mass that have applied the new voluntary/required distinction, but in none of these decisions did the courts set forth any rationale or analysis for their conclusions on this pivotal issue and instead the information at issue was either summarily declared to have been voluntarily provided[69] or, conversely, to have been required.[70]

In one other case, the court discussed the applicability of the Critical Mass distinction to documents that had been provided to the agency not by their originator, but as a result of the unauthorized action of a confidential source.[71] Although these documents were not actually at issue in the case, the court nevertheless elected to analyze their status under Critical Mass.[72] The court first noted that the decision in Critical Mass provided it with "little guidance" as those documents "had been produced voluntarily by the originator, without any intervening espionage."[73] The court nevertheless opined that in its case "the secret, unauthorized delivery" of the documents at issue made the submission "'involuntary' in the purest sense," but that application of the "more stringent standard for involuntary transfer would contravene the spirit" of Critical Mass.[74] Thus, the court declared that in such circumstances the proper test for determining the confidentiality of the documents should be the "more permissive standard" of Critical Mass, i.e., protection would be afforded if the information was of a kind that is not customarily released to the public by the submitter.[75]

Under Critical Mass, once information is determined to be voluntarily provided it is to be afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from

---

[69] See Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (unit price information) (reverse FOIA suit); McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 35 (D.D.C. Sept. 30, 1992) (bench order) (exercised option price) (non-FOIA case brought under Administrative Procedure Act) (petition for reh'g pending); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (unit price information).

[70] See Africa Fund v. Mosbacher, No. 92-289, slip op. at 15-16 & n.3 (S.D.N.Y. May 26, 1993) (information concerning export license applications); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 15 (C.D. Cal. May 10, 1993) (information concerning New Drug Application).

[71] Government Accountability Project v. NRC, slip op. at 2.

[72] See id. at 10.

[73] Id. at 11-12.

[74] Id. at 12.

[75] Id.; see also id. at 11 (citing Critical Mass, 975 F.2d at 879).

whom it was obtained."[76] The D.C. Circuit observed in Critical Mass that this test was "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."[77] The subsequent cases that have applied this "customary treatment" standard to information found to have been voluntarily submitted contain rather limited and often conclusory discussions of the showing necessary to satisfy it.[78] Nevertheless, in one of these cases the court did provide some useful elaboration by specifically noting and then rejecting, as "vague hearsay," the requester's contention that there had been "prior, unrestricted disclosure" of the information at issue.[79] In so doing, the court expressly found the requester's evidence to be "nonspecific" and lacking precision "regarding dates and times" of the alleged disclosures; conversely, it noted that the submitter had "provided specific, affirmative evidence that no unrestricted disclosure" had occurred.[80] Accordingly, the court concluded that it had been "amply demonstrated" that the information satisfied the customary treatment standard of Critical Mass.[81]

In creating this customary treatment standard, the D.C. Circuit in Critical Mass articulated the test as dependent upon the treatment afforded the information by the individual submitter and not the treatment afforded the information by an industry as a whole.[82] This approach has been followed by all the cases applying the customary treatment standard thus far, although one court also

---

[76] 975 F.2d at 879.

[77] Id.

[78] See Government Accountability Project v. NRC, slip op. at 11 (it "is not to be doubted" that documents are "unavailable to the public"); Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1229 (it is "readily apparent that the information is of a kind that [the submitter] would not customarily share with its competitors or with the general public"); McDonnell Douglas Corp. v. Rice, transcript at 35 ("it is not challenged that [the submitter] does not customarily make available to the public the prices it proposes in its contract bids"); Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 27 (pricing information "is of a kind that would customarily not be released to the public by the entity from which it is obtained"); Harrison v. Lujan, No. 90-1512, slip op. at 1 (D.D.C. Dec. 8, 1992) (agency's "uncontradicted evidence . . . establishes that the documents at issue contain information that the provider would not customarily make available to the public"); Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) ("it has been amply demonstrated that [the submitters] would not customarily release the information to the public") (appeal pending).

[79] See Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 989.

[80] Id.

[81] Id. at 990.

[82] See 975 F.2d at 872, 878, 879, 880; accord FOIA Update, Spring 1993, at 7 (advising agencies applying customary treatment standard to examine treatment afforded information by individual submitter).

found it "relevant" that the requester--who was a member of the same industry as the submitters--had, "up until the eve of trial," taken the position that the type of information at issue ought not to be released.[83] Further, as applied by the D.C. Circuit in Critical Mass, the customary treatment standard allows for some disclosures of the information to have been made, provided that such disclosures were not made to the general public.[84]

As a matter of sound administrative practice the Department of Justice has advised agencies to employ procedures analogous to those set forth in Executive Order No. 12,600[85] when making determinations under the customary treatment standard.[86] (For a further discussion of the Executive Order and its requirements, see Competitive Harm Prong of National Parks, and "Reverse" FOIA, below.) Accordingly, whenever an agency is uncertain of a submitter's customary treatment of requested information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur.[87]

### Impairment Prong of National Parks

For information that is "required" to be submitted to an agency, the Court of Appeals for the District of Columbia Circuit has held that the tests for confidentiality originally established in National Parks & Conservation Ass'n v. Morton,[88] continue to apply.[89] The first of these tests, the impairment prong, traditionally had been found to be satisfied when an agency demonstrated that the information at issue was provided voluntarily and that submitting entities would not provide such information in the future if it were subject to public disclosure.[90] Conversely, protection under the impairment prong traditionally

---

[83] Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 27.

[84] See 975 F.2d at 880 (specifically citing to lower court decision that noted records had been provided to numerous interested parties under nondisclosure agreements, but had not been provided to public-at-large); accord FOIA Update, Spring 1993, at 7 (advising agencies that customary treatment standard allows submitter to have made some disclosures of information, provided such disclosures are not "public" ones).

[85] 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

[86] FOIA Update, Spring 1993, at 7.

[87] Id.

[88] 498 F.2d 765, 770 (D.C. Cir. 1974).

[89] Critical Mass, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

[90] See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (manu-
(continued...)

has been denied when it was determined that the benefits associated with submission of particular information made it unlikely that the agency's ability to obtain future such submissions would be impaired.[91]

---

[90](...continued)
facturing formulas, processes, quality control and internal security measures submitted voluntarily to FDA to assist with cyanide-tampering investigations protected pursuant to impairment prong because agencies relied heavily on such information and would be less likely to obtain it if businesses feared it would be made public); Klayman & Gurley v. United States Dep't of Commerce, No. 88-0783, slip op. at 4 (D.D.C. Apr. 17, 1990); ISC Group v. DOD, No. 88-0631, slip op. at 7 (D.D.C. May 22, 1989); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 328 (D.D.C. 1986); Carlisle Tire & Rubber Co. v. Customs Serv., 1 Gov't Disclosure Serv. (P-H) ¶ 79,162, at 79,268 (D.D.C. Nov. 21, 1979) (impairment prong satisfied when agency's guarantee of confidentiality was essential to voluntary cooperation of foreign manufacturers in providing "essential" information), aff'd in part, rev'd in part on other grounds, 663 F.2d 210 (D.C. Cir. 1980).

[91] See, e.g., Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 6 (M.D. Fla. June 3, 1986) (no impairment when submission "virtually mandatory" if supplier wished to do business with government); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (same), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"); see also Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (no impairment based on speculative assertion that public disclosure of Dun & Bradstreet reports will adversely affect company's profits and thus make it "unlikely" that credit agencies will do business with government; this "intimation regarding impairment of profits in no way speaks to the ability of affected credit agencies to continue to exist and supply needed data"); RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (no impairment for "contract bid prices, terms and conditions . . . since bids by nature are offers to provide goods and/or services for a price and under certain terms and conditions"); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 677 (D.D.C. 1992) (no impairment given fact that requested documents contained no "sensitive information" and there was "no reason to believe" that such information would not be provided in future), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993). But see Orion Research, Inc. v. EPA, 615 F.2d 551, 554 (1st Cir.) (finding impairment for technical proposals submitted in connection with government contract because release "would induce potential bidders to submit proposals that do not include novel ideas"), cert. denied, 449 U.S. 833 (1980); RMS Indus. v. DOD, slip op. at 7 (finding impairment for equipment descriptions, employee, customer, and subcontractor names submitted in connection with government contract because (continued...)

Under the new categorical test announced by the D.C. Circuit in Critical Mass, the voluntary character of an information submission is now sufficient to render it exempt, provided the information would not be customarily released to the public by the submitter.[92] (For a further discussion of this point, see Applying Critical Mass, above.) In this regard, the D.C. Circuit has made it clear that an agency's unexercised authority, or mere "power to compel" submission of information, does not preclude such information from being provided to the agency "voluntarily."[93] This holding was compatible with several decisions rendered prior to Critical Mass that had protected information under the impairment prong despite the existence of agency authority that could have been used to compel its submission.[94]

As a result of the D.C. Circuit's ruling in Critical Mass the significance of the impairment prong is undoubtedly diminished.[95] Nevertheless, the D.C. Circuit recognized that even when agencies require submission of information "there are circumstances in which disclosure could affect the reliability of such data."[96] Thus, in the aftermath of Critical Mass, the impairment prong of

---

[91](...continued)
"bidders only submit such information if it will not be released to their competitors"); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 29 (E.D. Va. Sept. 10, 1992) (bench order) (finding impairment for detailed unit price information despite lack of "actual proof of a specific bidder being cautious in its bid or holding back").

[92] 975 F.2d at 879.

[93] Id. at 880; see FOIA Update, Spring 1993, at 5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[94] See Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,974 (D.D.C. June 24, 1983); Klayman & Gurley v. Department of Commerce, slip op. at 5-6; see also, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983) (whether submissions are mandatory was a factor to be considered in an impairment claim, but was "not necessarily dispositive"); Washington Post Co. v. HHS, 690 F.2d 252, 268-69 (D.C. Cir. 1982); Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991); Atkinson v. SEC, No. 83-2030, slip op. at 4 (D.D.C. Oct. 27, 1983); Stewart v. Customs Serv., 2 Gov't Disclosure Serv. (P-H) ¶ 81,140, at 81,380 (D.D.C. Feb. 6, 1981). But see Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990) ("[W]here compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.") (decided prior to Critical Mass and thus now in conflict with that decision), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

[95] See FOIA Update, Spring 1993, at 7.

[96] Critical Mass, 975 F.2d at 878 (citing Washington Post Co. v. HHS, 690 F.2d at 268-69); see also ISC Group v. DOD, slip op. at 8 (report voluntarily
(continued...)

National Parks now applies to those situations where information is required to be provided, but where disclosure of that information under the FOIA will result in a diminution of the "reliability" or "quality" of what is submitted.[97]

If an agency determines that release will not cause impairment, that decision should be given extraordinary deference by the courts.[98] In this regard there are two conflicting decisions addressing the feasibility of a submitter raising the issue of impairment on behalf of an agency. In one, the district court ruled that a submitter has "standing" to raise the issue of impairment;[99] but in a more recent case, the Court of Appeals for the Fourth Circuit specifically refused to allow a submitter to make an impairment argument on the agency's behalf.[100]

A decade ago, in Washington Post Co. v. HHS, the D.C. Circuit held that an agency must demonstrate that a threatened impairment is "significant," because a "minor" impairment is insufficient to overcome the general disclosure mandate of the FOIA.[101] Moreover, in Washington Post the D.C. Circuit

---

[96](...continued)
submitted "may contain more information and be more helpful" to agency "than any information submitted pursuant to a compulsory production demand"). But see Silverberg v. HHS, No. 89-2743, slip op. at 11-12 (D.D.C. June 14, 1991) (rejecting, as "entirely speculative," claim of qualitative impairment based on contention that laboratory inspectors--who work in teams of three and whose own identities are protected--would fear litigation and thus be less candid if names of laboratories they inspected were released), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Teich v. FDA, 751 F. Supp. at 252 (rejecting, as "absurd," contention that companies would be less likely to conduct and report safety tests to FDA for fear of public disclosure because companies' own interests in engendering good will and in avoiding product liability suits is assurance that they will conduct "the most complete testing program" possible).

[97] See 975 F.2d at 878; accord Africa Fund v. Mosbacher, No. 92-289, slip op. at 17 (S.D.N.Y. May 26, 1993) (protection of information submitted with export license applications "fosters the provision of full and accurate information").

[98] See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (observing that there is not "much room for judicial review of the quintessentially managerial judgment" that disclosure will not cause impairment); AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1401 (D.D.C. 1986) (finding that the agency "'is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information'" (quoting Orion Research, Inc. v. EPA, 615 F.2d at 554)), rev'd on procedural grounds & remanded, 810 F.2d 1233 (D.C. Cir. 1987).

[99] United Technologies Corp. v. HHS, 574 F. Supp. 86, 89 (D. Del. 1983).

[100] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988).

[101] 690 F.2d at 269.

held that the factual inquiry concerning the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."[102] Because the case was remanded for further proceedings, the court found it unnecessary to decide the details of such a balancing test at that time.[103]

Five years later, in the first panel decision in Critical Mass, the D.C. Circuit cited Washington Post to reiterate that a threatened impairment must be significant, but it made no mention whatsoever of a balancing test.[104] The notion of a balancing test was resurrected in a subsequent decision of the D.C. Circuit in the Washington Post case.[105] This time the D.C. Circuit elaborated on the balancing test--even suggesting that it might apply to all aspects of Exemption 4, not just the impairment prong--and held that "information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side."[106] Because the case was remanded once again (and ultimately was settled), the court did not actually rule on the outcome of such a balancing process.[107]

The district court decision in Critical Mass, on remand from the first panel decision of the D.C. Circuit, is the only decision to date to explicitly apply this balancing test under the impairment prong of Exemption 4.[108] (Although it did not expressly reference the term, one other district court has utilized a balancing test in ruling under the competitive harm prong.[109] For further discussion of this point, see Competitive Harm Prong of National Parks, below.) In Critical Mass, the district court held that a consumer organization requesting information bearing upon the safety of nuclear power plants had "no particularized need of its own" for access to the information and thus was "remitted to the general public interest in disclosure for disclosure's sake to support its request."[110] Although the court conceded that the public has an inter-

---

[102] Id.

[103] Id.

[104] 830 F.2d 278, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[105] 865 F.2d 320, 326-27 (D.C. Cir. 1989).

[106] Id. at 327.

[107] Id. at 328.

[108] 731 F. Supp. 554, 555-56 (D.D.C. 1990), rev'd in part on other grounds & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[109] See Teich v. FDA, 751 F. Supp. at 243.

[110] 731 F. Supp. at 556.

est "of significantly greater moment than idle curiosity" in information concerning the safety of nuclear power plants, that same interest was shared by the NRC and the submitter of the information and their interest in preventing disclosure was deemed to be of "a much more immediate and direct nature."[111] Curiously, when this decision in Critical Mass was subsequently reviewed by the both a second panel of the D.C. Circuit and then by the entire D.C. Circuit sitting en banc, no mention was made of any balancing test under Exemption 4.[112]

Competitive Harm Prong of National Parks

The great majority of Exemption 4 cases have involved the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton.[113] In order for an agency to make a determination under this prong it is essential that the submitter of the requested information be given an opportunity to provide the agency with its views on the possible competitive harm that would be caused by disclosure. While such an opportunity had long been voluntarily afforded submitters by several agencies and had been recommended by the Department of Justice,[114] it is now required by executive order. Executive Order No. 12,600[115] now provides for mandatory notification of submitters of confidential commercial information whenever an agency "determines that it may be required to disclose" such information under the FOIA.[116] Once submitters are notified, they must be given a reasonable period of time within which to object to disclosure of any of the requested information.[117] The Executive Order requires that agencies give careful consideration to the submitters' objections and provide them with a written statement explaining why any such objections are not sustained.[118] (For a further discussion of these procedures, see "Reverse" FOIA, below.) If an agency decides to invoke Exemption 4 and that decision is subsequently challenged in court by a FOIA requester, the submitter's objections to disclosure--usually provided in an affidavit filed in conjunction with the agency's papers--will, in turn, be evaluated and relied upon by the court in determining the propriety of

---

[111] Id.

[112] See 931 F.2d 939, 945-47 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[113] 498 F.2d 765, 770 (D.C. Cir. 1974).

[114] See FOIA Update, June 1982, at 3.

[115] 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

[116] Exec. Order No. 12,600, § 1.

[117] Id. § 4.

[118] Id. § 5.

the exemption claim.[119]

The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines. For example, in some contexts customer names have been withheld because disclosure would cause substantial competitive harm[120] and in other contexts customer names have been ordered released because disclosure would not cause substantial competitive harm.[121] The individualized and sometimes conflicting determinations indicative of competitive harm holdings is well illustrated in one case in which the Court of Appeals for the District of Columbia Circuit originally affirmed a district court's decision which found that customer names of "CAT" scanner manufacturers were protected,[122] but subsequently vacated that decision upon the death of one of its judges.[123] On reconsideration, the newly constituted panel found that disclosure of the customer list raised a factual question as to

---

[119] See, e.g., North Carolina Network for Animals v. United States Dep't of Agric., No. 90-1443, slip op. at 8 (4th Cir. Feb. 5, 1991) (noting absence of sworn affidavits or detailed justification for withholding from submitters of information); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 676 (D.D.C. 1992) (noting that "no evidence" was provided to indicate that submitters objected to disclosure), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993); Brown v. Department of Labor, No. 89-1220, slip op. at 6 (D.D.C. Feb. 15, 1991), appeal dismissed, No. 91-5108 (D.C. Cir. Dec. 3, 1991); Teich v. FDA, 751 F. Supp. 243, 254 (D.D.C. 1990) (after striking original declaration of submitter "on basic fairness grounds," court found submitter then "not able to support its position"), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 121 (D.S.D. 1984) (disclosure ordered with court noting that "[i]t is significant that [the submitter] itself has not submitted an affidavit addressing" the issue of competitive harm); see also Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991) (rejecting challenge to agency's reliance on submitter's declaration, finding it entirely "relevant" to competitive harm determination); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (where only some submitters made objections to disclosure, court permitted requester to obtain copies of those objections through discovery to enable him to substantiate his claim that not all submitters were entitled to Exemption 4 protection) (discovery order).

[120] See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992); Goldstein v. ICC, No. 82-1511, slip op. at 6 (D.D.C. July 31, 1985) (case reopened and customer names found protectible); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,120 (D.D.C. Dec. 4, 1980).

[121] See, e.g., Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1566 (D.D.C. 1985); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 290 (D.D.C. 1980).

[122] Greenberg v. FDA, 775 F.2d 1169, 1172-73 (D.C. Cir. 1985).

[123] Greenberg v. FDA, 803 F.2d 1213, 1215 (D.C. Cir. 1986).

the showing of competitive harm that precluded the granting of summary judgment after all.[124]

Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.[125] One court, however, has gone so far as to employ a balancing test under this prong--although it never expressly referred to it as such or cited to any authority supporting its application--finding that disclosure of certain safety and effectiveness data pertaining to a medical device was "unquestionably in the public interest" and that the benefit of releasing this type of information "far outstrips the negligible competitive harm" alleged by the submitter.[126] (For a further discussion of this point, see Impairment Prong of National Parks, above.)

Although conclusory allegations of harm are unacceptable,[127] it is clear that "elaborate antitrust proceedings" are not required.[128] One court concluded that disclosure of certain wage information would cause competitive harm based upon the fact that the requester, who was a competitor of the submitter,

---

[124] Id. at 1219.

[125] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); see, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); accord NBC v. SBA, No. 92 Civ. 6483, slip op. at 5 n.3 (S.D.N.Y. Jan. 28, 1993) (although court noted that agency "should have provided more details" regarding possible competitive harm, generalized sworn declaration from submitter found sufficient); Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 4 (D.D.C. June 1, 1987) (submitter not required to document or pinpoint actual harm, but need only show its likelihood) (partial grant of summary judgment), renewed motion for summary judgment granted (D.D.C. Mar. 30, 1988); see also Hercules, Inc. v. Marsh, 659 F. Supp. 849, 854 (W.D. Va. 1987) (given fact that contract always awarded to submitter, protection under competitive harm prong unavailable as submitter failed to meet "threshold requirement" of facing competition) (reverse FOIA suit), aff'd, 839 F.2d 1027 (4th Cir. 1988).

[126] Teich v. FDA, 751 F. Supp. at 253. But cf. Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 18 (C.D. Cal. May 10, 1993) (finding competitive harm and so protecting research data used to support safety and effectiveness of pharmaceutical drug).

[127] See, e.g., Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict") (reverse FOIA suit).

[128] National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 (D.C. Cir. 1976); accord Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

had requested confidential treatment for its own similar submission.[129] In denying a competitive harm claim, another court noted that because the requested information pertained to every laboratory in a certain program, disclosure would not create a competitive advantage for any one of them because "each laboratory would have access to the same type of information as every other laboratory in the program."[130]

Some courts have utilized a "mosaic" approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.[131] In one case where it was found that a company's labor costs would be revealed by disclosure of its wage rate and manhour information, the court employed what could be called a "reverse-mosaic" approach and ordered release of the wage rates without the manhour information, finding that release of one without the other would not cause the company competitive harm.[132]

Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable.[133] (The public

---

[129] HLI Lordship Indus. v. Committee for Purchase from the Blind & Other Severely Handicapped, 663 F. Supp. 246, 251 (E.D. Va. 1987).

[130] Silverberg v. HHS, No. 89-2743, slip op. at 10 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); see also Carolina Biological Supply Co. v. United States Dep't of Agric., No. 93CV00113, slip op. at 8 (M.D.N.C. Aug. 2, 1993) (competitive harm unlikely when all companies in same business will have equal access to disputed information) (reverse FOIA suit).

[131] See, e.g., Lederle Lab. v. HHS, No. 88-0249, slip op. at 22-23 (D.D.C. July 14, 1988) (scientific tests and identities of agency reviewers withheld because disclosure would permit requester to "indirectly obtain that which is directly exempted from disclosure"); Timken Co. v. United States Customs Serv., 491 F. Supp. 557, 559 (D.D.C. 1980); Carlisle Tire & Rubber Co. v. United States Customs Serv., 1 Gov't Disclosure Serv. (P-H) ¶ 79,162, at 79,269 (D.D.C. Nov. 21, 1979).

[132] Painters Dist. Council Six v. GSA, No. 85-2971, slip op. at 8 (N.D. Ohio July 23, 1986); see also Lykes Bros. S.S. Co. v. Pena, slip op. at 15 (submitter failed to show any harm given fact that proposed disclosures would "redact all price terms, financial terms, rates and the like"); San Jose Mercury News v. Department of Justice, No. 88-20504, slip op. at 4-5 (N.D. Cal. Apr. 17, 1990) (no harm once company name and other identifying information deleted from requested forms).

[133] See, e.g., Anderson v. HHS, 907 F.2d 936, 952 (10th Cir. 1990) ("[N]o meritorious claim of confidentiality" can be made for documents which are in the public domain.); CNA Fin. Corp. v. Donovan, 830 F.2d at 1154; Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977);
(continued...)

availability of information has also defeated an agency's impairment claim.[134]) One court has held, however, that simply because individuals subject to a drug test had "a right of access to the performance and testing information" of the laboratory conducting their tests, that did "not make the [requested] information [concerning all certified laboratories] publicly available."[135]

The feasibility of "reverse engineering" has been considered in evaluating a showing of competitive harm. In Worthington Compressors, Inc. v. Costle,[136] the D.C. Circuit held that the cost of reverse engineering (i.e., the cost of obtaining a finished product and dismantling it to learn its constituent elements) is a pertinent inquiry and that the test should be "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it."[137] (This inquiry into the possibility of reverse engineering is not applicable to documents withheld under the trade secret category of Exemption 4.[138])

In Worthington Compressors, the D.C. Circuit pointed out that agency disclosures of information that benefit competitors at the expense of submitters

---

[133](...continued)
MCI Telecommunications Corp. v. GSA, No. 89-0746, slip op. at 17 (D.D.C. Mar. 25, 1992); International Computaprint v. United States Dep't of Commerce, No. 87-1848, slip op. at 13 (D.D.C. Aug. 16, 1988) (reverse FOIA suit); Goldstein v. ICC, slip op. at 2; Trend Imports Sales, Inc. v. EPA, 3 Gov't Disclosure Serv. (P-H) ¶ 83,115, at 83,707 (D.D.C. Mar. 1, 1983).

[134] See Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1371 (E.D.N.C. 1986).

[135] Silverberg v. HHS, slip op. at 7 (D.D.C. June 14, 1991); see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (nonspecific allegation of prior, unrestricted disclosure insufficient to remove Exemption 4 protection in light of specific, affirmative evidence that no unrestricted disclosure had occurred) (appeal pending).

[136] 662 F.2d 45, 52 (D.C. Cir.), supplemental opinion sub nom. Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981).

[137] Accord Greenberg v. FDA, 803 F.2d at 1218; Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 7-8 (M.D. Fla. June 3, 1986); Air Line Pilots Ass'n Int'l v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Zotos Int'l v. Young, 830 F.2d 350, 353 (D.C. Cir. 1987) (if commercially valuable information has remained secret for many years, it is incongruous to argue that it may be readily reverse-engineered) (non-FOIA case).

[138] See Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 2-3 (D.D.C. Dec. 16, 1987) (refusing to consider feasibility of reverse engineering for documents withheld as trade secrets because once trade secret determination is made, documents "'are exempt from disclosure, and no further inquiry is necessary'" (quoting Public Citizen Health Research Group v. FDA, 704 F.2d at 1286)).

deserve "close attention" by the courts.[139] As the court of appeals observed:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.[140]

Further, neither the willingness of the requester to restrict circulation of the information nor a claim by the requester that it is not a competitor of the submitter should logically defeat a showing of competitive harm. The question is whether "public disclosure" would cause harm; there is no "middle ground between disclosure and nondisclosure."[141] Additionally, the mere passage of time does not necessarily erode Exemption 4 protection, provided that disclosure of the material would still be likely to cause substantial competitive harm.[142]

---

[139] 662 F.2d at 51.

[140] Id.; accord Washington Psychiatric Soc'y v. OPM, No. 87-1913, slip op. at 5 (D.D.C. Oct. 13, 1988); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 9 (D.D.C. Sept. 29, 1987), modified (D.D.C. Nov. 20, 1987), motion to amend judgment denied (D.D.C. Dec. 16, 1987); Air Line Pilots Ass'n v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 988-89 (noting submitter's twenty-two million dollar investment and rejecting requester's argument that receipt of seven million dollars in annual sales revenue is somehow "de minimis"); SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-0481, slip op. at 7 (D.D.C. Mar. 31, 1989) (noting that release would allow competitors access to information that they would have to spend "considerable funds" to develop on their own).

[141] Seawell, Dalton, Hughes & Timms v. Export-Import Bank, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984); Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. 507, 512 (D. Kan. 1984).

[142] See, e.g., Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. at 514 (nine-year-old data protected); Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,976 (D.D.C. June 24, 1983) (ten-year-old data protected); see also FOIA Update, Fall 1983, at 14; see generally Africa Fund v. Mosbacher, No. 92-289, slip op. at 19-20 (S.D.N.Y. May 26, 1993) (rejecting argument that exemption permanently precludes release because passage of time might render later disclosures "of little consequence"); Teich v. FDA, 751 F. Supp. at 253 (rejecting competitive harm protection based partly upon fact that documents were as much as 20 years old).

Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of: detailed financial information such as a company's assets, liabilities, and net worth;[143] actual costs, break-even calculations, profits and profit rates;[144] data describing a company's workforce which would reveal labor costs, profit margins and competitive vulnerability;[145] a company's selling prices, purchase activity and freight charges;[146] a company's purchase records, including prices paid for advertising;[147] technical and commercial data, names of consultants and subcontractors, performance, cost and equipment information;[148] shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company;[149] currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information;[150] raw research data used to support a pharmaceutical drug's safety and effectiveness, information regarding an unapproved application to market the drug in a different manner, and sales and distribution data of a drug manufacturer;[151] and technical proposals which are submitted, or could be used, in conjunction with offers on government contracts.[152]

---

[143] See, e.g., National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 684; Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 87CV2384, slip op. at 8-9 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation) (dollar volume of business), adopted (N.D. Ohio May 22, 1992).

[144] See, e.g., Gulf & Western Indus. v. United States, 615 F.2d at 530.

[145] See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

[146] See, e.g., Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. at 289.

[147] See, e.g., Destileria Serralles, Inc. v. Department of the Treasury, No. 85-0837, slip op. at 9 (D.P.R. Sept. 22, 1988).

[148] See, e.g., RMS Indus. v. DOD, slip op. at 7; BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,189, at 81,495 (D.D.C. Mar. 20, 1981).

[149] See, e.g., Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 6-8 (D.D.C. Mar. 30, 1988).

[150] See, e.g., SMS Data Prods. Group v. United States Dep't of the Air Force, slip op. at 6-8.

[151] See Citizens Comm'n on Human Rights v. FDA, slip op. at 18-20.

[152] See, e.g., Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 8 (D. Mont. Sept. 9, 1988); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986); Professional Review Org. v. HHS, 607 F. Supp. 423, 426 (D.D.C. 1985) (detailing manner in which professional services contract was to be conducted).

On the other hand, protection under the competitive harm prong has been denied when the prospect of injury is remote[153]--for example when a government contract is not awarded competitively[154]--or when the requested information is too general in nature.[155]

In addition, several courts, including the D.C. Circuit, have held that the harms flowing from "embarrassing" disclosures, or disclosures which could cause "customer or employee disgruntlement," are not cognizable under Exemption 4.[156] (Moreover, such harms would not be cognizable under Exemption

---

[153] See, e.g., Carolina Biological Supply Co. v. United States Dep't of Agric., slip op. at 9 (disclosure of number of animals sold by companies supplying laboratory specimens "will be simply a small addition to information available in the marketplace" and thus will not cause competitive harm); Teich v. FDA, 751 F. Supp. at 254 (safety and effectiveness data pertaining to medical device ordered disclosed on basis of finding that at "this late date" in product approval process, disclosure "could not possibly help" competitors of submitter); see also Brown v. Department of Labor, slip op. at 5 (certain wage information not protected because no showing submitter would suffer "'substantial' injury" if information were disclosed).

[154] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (reverse FOIA suit); see also U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 12 (D.D.C. Mar. 26, 1986) (aggregate contract price for armored limousines for the President ordered disclosed as not competitively harmful given unique nature of contract and agency's role in design of vehicles); cf. Cove Shipping, Inc. v. Military Sealift Command, No. 84-2709, slip op. at 8-10 (D.D.C. Feb. 27, 1986) (contract's wage and benefit breakdown not protected because it related to "one isolated contract, in an industry where labor contracts vary from bid to bid") (civil discovery case in which Exemption 4 case law applied).

[155] North Carolina Network for Animals v. United States Dep't of Agric., slip op. at 9 (general information regarding sales and pricing that would not reveal submitters' costs, profits, sources, or age, size, condition, or breed of animals sold); SMS Data Prods. Group v. United States Dep't of the Air Force, slip op. at 8 (general information regarding publicly held corporation's management structure, financial and production capabilities, corporate history and employees, most of which would be found in corporation's annual report and SEC filings and would in any event be readily available to a stockholder); Davis Corp. v. United States, No. 87-3365, slip op. at 9 (D.D.C. Jan. 19, 1988) (information contained in letters from contractor to agency regarding performance of contract that did not reveal contractor's suppliers or costs) (reverse FOIA suit); EHE Nat'l Health Serv., Inc. v. HHS, No. 81-1087, slip op. at 5 (D.D.C. Feb. 24, 1984) ("mundane" information regarding submitter's operation) (reverse FOIA suit); American Scissors Corp. v. GSA, No. 83-1562, slip op. at 8 (D.D.C. Nov. 15, 1983) (general description of manufacturing process with no details) (reverse FOIA suit).

[156] General Elec. Co. v. NRC, 750 F.2d 1394, 1402-03 (7th Cir. 1984); see (continued...)

6 either, for it is well established that businesses have no "corporate privacy."[157] For a further discussion of this point, see the cases cited under Exemption 6, below.) More recently, the D.C. Circuit skirted this issue and expressly did not decide whether an allegation of harm flowing only from the embarrassing publicity associated with disclosure of a submitter's illegal payments to government officials would be sufficient to establish competitive harm.[158] Nevertheless, the court did go on to hold that the submitter's "right to an exemption, if any, depends upon the competitive significance of whatever information may be contained in the documents" and that the submitter's motive for seeking confidential treatment, even if it was to avoid embarrassing publicity, was "simply irrelevant."[159]

The status of unit prices in awarded government contracts has once again become a controversial issue under Exemption 4. Previously, there were three cases which contained a thorough analysis of the possible effects of disclosure of unit prices, including two appellate decisions, and in all three of these cases the court denied Exemption 4 protection, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.[160]

In the most recent of these cases, the Court of Appeals for the Ninth Circuit denied Exemption 4 protection for the unit prices provided by a successful offeror despite the offeror's contention that competitors would be able to determine its profit margin by simply subtracting from the unit price the other

---

[156](...continued)
also CNA Fin. Corp. v. Donovan, 830 F.2d at 1154 ("unfavorable publicity" and "demoralized" employees insufficient for showing of competitive harm); Public Citizen Health Research Group v. FDA, 704 F.2d at 1291 n.30 (competitive harm limited to that flowing from "affirmative use of proprietary information by competitors"); Silverberg v. HHS, slip op. at 10 (D.D.C. June 14, 1991) (possibility that competitors might "distort" requested information and thus cause submitter embarrassment insufficient for showing of competitive harm); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) ("fear of litigation" insufficient for showing of competitive harm), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987).

[157] See, e.g., National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 685 n.44.

[158] See Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (reverse FOIA suit).

[159] Id.

[160] See Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Acumenics Research & Technology, Inc. v. United States Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (reverse FOIA suit); J.H. Lawrence Co. v. Smith, No. 81-2993, slip op. at 8-9 (D. Md. Nov. 10, 1982).

component parts which are either set by statute or standardized within the industry.[161] The Ninth Circuit upheld the agency's determination that competitors would not be able to make this type of calculation because the component figures making up the unit price were not, in fact, standardized, but instead were subject to fluctuation.[162]

Similarly, in the absence of a showing of competitive harm, the District Court for the District of Columbia has denied Exemption 4 protection for the prices charged the government for computer equipment, stating that "[d]isclosure of prices charged the Government is a cost of doing business with the Government."[163] Later, this same court recognized the "strong public interest in release of component and aggregate prices in Government contract awards," and thus again rejected an Exemption 4 claim for unit prices.[164]

The current Federal Acquisition Regulation (FAR) also mandates the disclosure of successful offerors' unit prices (with some exceptions) in negotiated contracts in excess of $10,000 through a post-award debriefing process.[165] Because Exemption 4 protection is vitiated if the information is publicly available elsewhere, all unit prices of successful offerors that are required to be disclosed under the FAR debriefing scheme should not be considered to be within the available protection of Exemption 4.[166]

---

[161] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1347.

[162] Id. at 1347-48; accord RMS Indus. v. DOD, slip op. at 7 (court "unconvinced based on the evidence that the release of contract bid prices, terms and conditions whether interim or final will harm the successful bidders").

[163] Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); accord JL Assocs., 90-2 CPD 261, B-239790 at 4 (Oct. 1, 1990) (Comptroller General decision noting that "disclosure of prices charged the government is ordinarily a cost of doing business with the government"); see also EHE Nat'l Health Serv., Inc. v. HHS, slip op. at 4 ("[O]ne who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement.").

[164] AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986); rev'd on other grounds & remanded, 810 F.2d 1233, 1236 (D.C. Cir. 1987). But see Sperry Univac Div. v. Baldrige, 3 Gov't Disclosure Serv. (P-H) ¶ 83,265, at 84,052 (E.D. Va. June 16, 1982) (protecting unit prices on finding that they revealed submitter's pricing and discount strategy), appeal dismissed, No. 82-1723 (4th Cir. Nov. 22, 1982).

[165] 48 C.F.R. § 15.1001(c)(1)(iv) (1992).

[166] See FOIA Update, Fall 1984, at 4; FOIA Update, Winter 1986, at 6; accord JL Assocs., 90-2 CPD 261, B-239790 at 4 n.2 (Oct. 1, 1990) (Comptroller General decision rejecting argument that disclosure of option unit prices would cause submitter competitive harm by revealing pricing strategy and decisionmaking process and noting that FAR "expressly advises awardees that the (continued...)

During the past two years, however, and prior to the decision by the D.C. Circuit in Critical Mass,[167] there were three cases involving unit prices decided by the District Court for the District of Columbia, with each case reaching a different result. In one, the court ordered disclosure of the unit prices, rejecting as "highly speculative" the argument that their release would allow competitors to calculate the submitter's profit margin and thus be able to underbid it in future procurements.[168] In another case, the court determined that the submitter's competitive harm arguments were not speculative and it even went so far as to issue an injunction permanently prohibiting the agency from releasing those unit prices to the public.[169] In the third case, the court found that it was a "fact-intensive question" whether the submitter would suffer competitive harm from release of its "price information" and it therefore declined to rule on the applicability of Exemption 4 in the context of a summary judgment motion.[170]

That same district court issued another opinion during that same time period in a case involving unexercised option prices rather than "ordinary" unit prices.[171] In that case, the court expressly stated that it "generally agrees that '[d]isclosure of prices charged the Government is a cost of doing business with the Government.'"[172] It then upheld the agency's decision to release the option prices because "competitively sensitive information such as cost, overhead,

---

[166](...continued)
unit prices of awards will generally be disclosed to unsuccessful offerors"). But see Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1229 n.4 (E.D. Va. 1993) (interpreting FAR provision to actually prohibit release of unit prices if such information "constitutes 'confidential business information'") (reverse FOIA suit); McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 38 (D.D.C. Sept. 30, 1992) (bench order) (in ruling on different FAR disclosure provision, found that even if such provision required disclosure of exercised option prices, such a disclosure would be "arbitrary and capricious") (non-FOIA case brought under Administrative Procedure Act) (petition for reh'g pending).

[167] 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

[168] Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 33 (D.D.C. 1991).

[169] McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 10 (D.D.C. Jan. 24, 1992) (bench order) (reverse FOIA suit) (appeal pending).

[170] MCI Telecommunications Corp. v. GSA, slip op. at 15.

[171] General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992) (reverse FOIA suit) (appeal pending).

[172] Id. (quoting Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. at 6).

or profit identifiers would not be revealed."[173]

None of the above cases concerning unit prices involved a request for pricing information submitted by an unsuccessful offeror. Three years ago, in the first decision to touch on this point, a court considered a situation in which the requester did not actually seek unit prices, but instead had requested the bottom-line price (total cumulative price) that an unsuccessful offeror had proposed for a government contract, as well as the bottom-line prices it had proposed for four years' worth of contract options.[174] In accepting the submitter's contention that disclosure of these bottom-line prices would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy, the court found that unsuccessful offerors had a different expectation of confidentiality than successful offerors, that the public interest in disclosure of pricing information concerning unawarded contracts was slight, and most importantly, that the unsuccessful offeror--who would be competing with the successful offeror on the contract options as well as on future related contracts--had demonstrated factually how the contract and option prices could be used by its competitors to derive data harmful to its competitive position.[175] Thus, in rare instances, it might be possible for an unsuccessful offeror to make out a claim under Exemption 4 for protection of its pricing information.[176]

In the aftermath of Critical Mass there have been three decisions that have afforded protection to unit and option prices premised on the theory that contract submissions are "voluntary" and that such pricing terms are not customarily disclosed to the public.[177] (These decisions appear to implicitly define voluntary submissions according to the nature of the activity to which they are connected and thus are contrary to the guidance issued by the Department of Justice concerning the voluntary/required distinction.[178] For a further discussion of Critical Mass and its new standard, see Applying Critical Mass, above.) In addition to affording protection to contract pricing information under Critical Mass, two of these decisions--in rather cursory orders issued

---

[173] Id.; see RMS Indus. v. DOD, slip op. at 7 (rejecting competitive harm claim for "interim" prices).

[174] Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 2-3 (D.D.C. Dec. 22, 1989).

[175] Id. at 8-15.

[176] See also FOIA Update, Spring/Summer 1990, at 2; FOIA Update, Fall 1983, at 10-11.

[177] See Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1229 (unit price information); McDonnell Douglas Corp. v. Rice, transcript at 35 (exercised option price); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (unit price information).

[178] See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

from the bench--went on to alternatively afford protection under the competitive harm prong.[179]

Third Prong of National Parks

In addition to the impairment prong and the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton, the decision specifically left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness.[180] Several subsequent decisions reaffirmed this possibility in dicta,[181] and with its en banc decision in Critical Mass, the Court of Appeals for the District of Columbia Circuit conclusively recognized the existence of a "third prong" under National Parks.[182]

The third prong received its first thorough appellate court analysis and acceptance by the Court of Appeals for the First Circuit.[183] That court expressly admonished against using the two primary prongs of National Parks as "the exclusive criteria for determining confidentiality" and held that the pertinent inquiry is whether public disclosure of the information will harm an "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA."[184]

---

[179] McDonnell Douglas Corp. v. Rice, transcript at 34, 36 (accepting submitter's assertion that disclosure of exercised option price would reveal pricing strategy and permit future bids to be predicted and undercut); Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 29; Findings of Fact at 7-8 (accepting same argument based on disclosure of detailed unit price information).

[180] 498 F.2d 765, 770 n.17 (D.C. Cir. 1974).

[181] See Washington Post Co. v. HHS, 690 F.2d 252, 268 n.51 (D.C. Cir. 1982); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976); Public Citizen Health Research Group v. FDA, 539 F. Supp. 1320, 1326 (D.D.C. 1982), rev'd & remanded on other grounds, 704 F.2d 1280 (D.C. Cir. 1983).

[182] 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993); see also FOIA Update, Spring 1993, at 7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[183] See 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1 (1st Cir. 1983); accord Africa Fund v. Mosbacher, No. 92-289, slip op. at 16 (S.D.N.Y. May 26, 1993) (finding third prong satisfied when agency "submitted extensive declarations that explain why disclosure of documents . . . would interfere with the export control system" (citing Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991))).

[184] 9 to 5, 721 F.2d at 10; see, e.g., Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (computer models protected under third prong because disclosure would make providers of proprietary input data
(continued...)

Thereafter, the Department of Justice issued policy guidance regarding Exemption 4 protection for "intrinsically valuable" records--records that are significant not for their content, but as valuable commodities which can be sold in the marketplace.[185] Because protection for such documents is well rooted in the legislative history of Exemption 4, the third prong of the National Parks test should permit the owners of such records to retain their full proprietary interest in them when release through the FOIA would result in a substantial loss of their market value.[186] Of course, this protection would be available only if there were sufficient evidence to demonstrate factually that potential customers would actually utilize the FOIA as a substitute for directly purchasing the records from the submitter.[187]

---

[184](...continued)
reluctant to supply such data to submitter, and without that data computer models would become ineffective, which, in turn, would reduce effectiveness of agency's program) (appeal pending); Clarke v. United States Dep't of the Treasury, No. 84-1873, slip op. at 4-6 (E.D. Pa. Jan. 24, 1986) (identities of Flower Bond owners protected under third prong because government had legitimate interest in fulfilling "pre-FOIA contractual commitments of confidentiality" given to investors in order to ensure that pool of future investors willing to purchase government securities was not reduced; if that occurred, the pool of money from which government borrows would correspondingly be reduced, thereby harming national interest); Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 808 (D.D.C. 1979) (loan applicant information withheld under third prong on showing that disclosure would impair Bank's ability to promote U.S. exports); see also FOIA Update, Fall 1983, at 15; cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents protected upon finding that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure . . . were required"). But see News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1269 (D. Mass. 1992) (recognizing existence of third prong, but declining to apply it based on lack of specific showing that agency effectiveness would be impaired), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

[185] See FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value").

[186] See id.; see also FOIA Update, Fall 1983, at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure).

[187] See Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 10-12 (D.D.C. Mar. 12, 1993) (rejecting argument that FOIA disclosure of Dun & Bradstreet report would cause "loss of potential customers" because no evidence was presented to support contention that potential customers would use FOIA in such a manner, particularly in light of time involved in receiving information through FOIA process; nor was it shown how many such reports would be available through FOIA and court would not assume that majority, or
(continued...)

The third prong was at issue in a case decided several years ago that concerned an agency that had the authority--but had not yet had the time and resources--to promulgate a regulation that would require submission of certain data.[188] During this interim period the agency was relying on companies to voluntarily submit the desired information.[189] The court rejected the agency's argument that under these circumstances disclosure would impair its efficiency and effectiveness, holding instead that because Congress had "announced a preference for mandatory over voluntary submissions," the agency was "hard-pressed to support its claim that voluntary submissions are somehow more efficient."[190]

Thirteen years after the National Parks decision first raised the possibility that Exemption 4 could protect interests other than those reflected in the impairment and competitive harm prongs, a panel of the Court of Appeals for the District of Columbia Circuit embraced the third prong in the first appellate decision in Critical Mass.[191] There, the panel adopted what it termed the "persuasive" reasoning of the First Circuit and expressly held that an agency may invoke Exemption 4 on the basis of interests other than the two principally identified in National Parks.[192]

Upon remand from the D.C. Circuit, the district court in Critical Mass found the requested information to be properly withheld pursuant to the third prong.[193] The court reached this decision based on the fact that if the requested information were disclosed, future submissions would not be provided until they were demanded under some form of compulsion--which would then have to be enforced, precipitating "acrimony and some form of litigation with

---

[187](...continued)
even substantial number, could be so obtained); Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (denying protection for Dun & Bradstreet reports because "the notion that those who are in need of credit information will use the government as a source in order to save costs belies common sense").

[188] See Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

[189] 751 F. Supp. at 251.

[190] Id. at 252-53.

[191] 830 F.2d 278, 282, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[192] 830 F.2d at 286.

[193] 731 F. Supp. 554, 557 (D.D.C. 1990), rev'd in part & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

attendant expense and delay."[194] On appeal for the second time, a panel of the D.C. Circuit reversed the lower court on this point, but that decision was itself vacated when the D.C. Circuit decided to hear the case en banc.[195]

In its en banc decision in Critical Mass, the D.C. Circuit conducted an extensive review of the interests sought to be protected by Exemption 4 and expressly held that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive."[196] In addition, the court went on to state that although it was overruling the first panel decision in Critical Mass, it "note[d]" that that panel had adopted the First Circuit's conclusion that Exemption 4 protects a "governmental interest in administrative efficiency and effectiveness."[197] Moreover, the D.C. Circuit specifically recognized yet another Exemption 4 interest--namely, "a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."[198] It declined to offer an opinion as to whether any other governmental or private interests might also fall within Exemption 4's protection.[199]

## Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.[200] Nevertheless, during the FOIA's first two decades, only two district court decisions had discussed "privilege" in the Exemption 4 context. In one case, a court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard

---

[194] 731 F. Supp. at 557.

[195] 931 F.2d 939, 944-45 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[196] 975 F.2d at 879.

[197] Id.; see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 990 (recognizing, after Critical Mass, third prong protection to prevent agency effectiveness from being impaired).

[198] 975 F.2d at 879.

[199] Id.

[200] See Washington Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

tribal interests. Such communications are entitled to protection as attorney work product."[201] In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.[202] In both of these cases the information was also withheld as "confidential."

Eight years ago, for the first time, a court protected material relying solely on the "privilege" portion of Exemption 4, recognizing protection for documents subject to the "confidential report" privilege.[203] In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents, but did not expressly characterize them as "privileged."[204] Another court subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.[205]

On the other hand, the Court of Appeals for the Tenth Circuit has recently held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure--which permits courts to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way--were not "privileged" for purposes of Exemption 4.[206] While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemption 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically embodied in the language of Exemption 4."[207] By contrast, it concluded, recognition of a priv-

---

[201] Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

[202] See Miller, Anderson, Nash, Yerke & Wiener v. United States Dep't of Energy, 499 F. Supp. 767, 771 (D. Or. 1980).

[203] Washington Post Co. v. HHS, 603 F. Supp. 235, 237-39 (D.D.C. 1985), rev'd on procedural grounds & remanded, 795 F.2d 205 (D.C. Cir. 1986).

[204] See M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations").

[205] Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (because self-critical analysis privilege previously rejected in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" prevented "relitigation" of that claim in federal court) (reverse FOIA suit).

[206] Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

[207] Id.

ilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'"[208] Similarly, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.[209]

Interrelation with Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act[210]--an extraordinarily broadly worded criminal statute--prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4. (See discussion of this statute in connection with Exemption 3, above.) Indeed, virtually every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."[211] In 1987, the Court of Appeals for the District of Columbia Circuit issued a long-awaited decision which contains an extensive analysis of the argument advanced by several commentators that the scope of the Trade Secrets Act is narrow, extending no more broadly than the scope of its three predecessor statutes.[212] The D.C. Circuit rejected that argument and held that the scope of the Trade Secrets Act is "at least co-extensive with that of Exemption 4."[213] Thus, the court held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.[214] The court concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act, i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act, because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.[215]

---

[208] Id.

[209] Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir.), cert. denied, 471 U.S. 1137 (1985).

[210] 18 U.S.C. § 1905 (1988).

[211] See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984).

[212] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144-52 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).

[213] 830 F.2d at 1151.

[214] Id. at 1151-52; see also id. at 1140 (noting that Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that "comprehensive catalogue of items" listed in Act "accomplishes essentially the same thing as if it had simply referred to 'all officially collected commercial information' or 'all business and financial data received'").

[215] Id. at 1152 n.139.

The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute "a serious abuse of agency discretion" redressable through a "reverse" FOIA suit.[216] Thus, in the absence of a statute or properly promulgated regulation authorizing release--which would remove the disclosure prohibition of the Trade Secrets Act--a determination by an agency that material falls within Exemption 4 is "tantamount" to a decision that it cannot be released.[217]

## EXEMPTION 5

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[1] As such, it has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."[2]

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"[3] the Supreme Court has now made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history.[4] Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]."[5] However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context as

---

[216] National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975); see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

[217] CNA Fin. Corp. v. Donovan, 830 F.2d at 1144.

[1] 5 U.S.C. § 552(b)(5) (1988).

[2] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

[3] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

[4] See United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also FOIA Update, Fall 1984, at 6.

[5] Martin v. Office of Special Counsel, 819 F.2d at 1185; see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("Exemption 5 requires the application of existing rules regarding discovery.").

it exists in the discovery context.[6] Thus, the precise contours of a privilege, with regard to applicable parties or types of information which are protectible, are also incorporated into the FOIA.[7]

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"), the attorney work-product privilege and the attorney-client privilege.[8]

Initial Considerations

The threshold issue under Exemption 5 is whether a record is of the sort intended to be covered by the phrase "inter-agency or intra-agency memorandums," a phrase which would seem to contemplate only those documents generated by an agency and not circulated beyond the executive branch. In fact, however, in recognition of the necessities and practicalities of agency operations, the courts have construed the scope of Exemption 5 far more expansively and have included documents generated outside of an agency. This pragmatic approach has been characterized as the "functional test" for assessing the applicability of Exemption 5 protection.[9] However, some documents generated within an agency, but transmitted outside of the executive branch, have been found to fail this threshold test and thus not qualify for Exemption 5 protection.[10]

Regarding documents generated outside of an agency but created pursuant to agency initiative, whether purchased or provided voluntarily without compensation, it has been held that "Congress apparently did not intend 'inter-agency and intra-agency' to be rigidly exclusive terms, but rather to include any agency

[6] See United States Dep't of Justice v. Julian, 486 U.S. 1, 13 (1988) (presentence report privilege, designed to protect report subjects, cannot be invoked against them as first-party requesters).

[7] Id.

[8] See NLRB v. Sears, Roebuck & Co., 421 U.S. at 149.

[9] See Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir.) (employing "a functional rather than a literal test in assessing whether memoranda are 'inter-agency or intra-agency'"), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); see also United States Dep't of Justice v. Julian, 486 U.S. 1, 11 n.9 (1988) (Scalia, J., dissenting) (issue not reached by majority).

[10] See, e.g., Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (agency records transmitted to Congress for purposes of congressional inquiry held not "inter-agency" records under Exemption 5 on basis that Congress is not an "agency" under FOIA); see also Paisley v. CIA, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983) (presaging Dow Jones by suggesting that agency responses to congressional requests for information may not constitute protectible "inter-agency" communications).

document that is part of the deliberative process."[11] Thus, recommendations from Congress may be protected,[12] as well as advice from a state agency.[13] Similarly, the Court of Appeals for the District of Columbia Circuit has held that Exemption 5 likewise applies to documents originating with a court.[14] Under this "functional" approach, documents generated by consultants outside of an agency are typically found to qualify for Exemption 5 protection because agencies, in the exercise of their functions, commonly have "a special need for the opinions and recommendations of temporary consultants."[15] Indeed, such advice can "play[] an integral function in the government's decision-[making]."[16]

Several years ago, the D.C. Circuit made broad use of the "functional" test, holding that Exemption 5's "inter-agency or intra-agency" threshold requirement was satisfied even where no "formal relationship" existed between HHS and an outside scientific journal reviewing an article submitted by an HHS

---

[11] Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980); see also Hooper v. Bowen, No. 88-1030, slip op. at 18 (C.D. Cal. May 24, 1989) ("courts have regularly construed this threshold test expansively rather than hypertechnically"); FOIA Update, June 1982, at 10 ("FOIA Counselor: Protecting 'Outside' Advice").

[12] Ryan v. Department of Justice, 617 F.2d at 790 (protecting judicial recommendations from senators to Attorney General).

[13] Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976) ("the rationale applies with equal force to advice from state as well as federal agencies").

[14] Durns v. Bureau of Prisons, 804 F.2d at 704 & n.5 (presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and Bureau of Prisons); cf. Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5--without discussing "inter-agency and intra-agency" threshold--to material supplied by outside contractors).

[15] Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (recognizing importance of outside consultants in deliberative process privilege context), cert. denied, 485 U.S. 977 (1988).

[16] Hoover v. United States Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979); Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (recommendations of volunteer consultants protected), cert. denied, 410 U.S. 926 (1973); Hooper v. Bowen, slip op. at 17-19 (records originating with private insurance companies which acted as "fiscal intermediaries" for Health Care Financing Administration protected); Beltone Elec. Corp. v. FTC, No. 81-1360, slip op. at 9-10 (D.D.C. Dec. 6, 1983) (documents prepared by paid outside consultants protected); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., 3 Gov't Disclosure Serv. (P-H) ¶ 83,182, at 83,846 (D.D.C. June 14, 1983) (same).

scientist for possible publication.[17] The D.C. Circuit held that the deciding factor is the "role" the evaluative comments from the journal's reviewers play in the process of agency deliberations--that is, they are regularly relied upon by agency authors and supervisors in making the agency's decisions.[18] While courts ordinarily require that there be some formal or informal relationship between the "consultant" and the agency, some courts have accorded Exemption 5 protection even absent such a relationship.[19]

However, a minority of courts, particularly in the context of witness statements taken in NLRB investigations, have not embraced the "functional test" and have rigidly applied the "inter-agency or intra-agency" language of Exemption 5's threshold to find that documents submitted by nonagency personnel are not protectible under the exemption.[20]

In 1990, the D.C. Circuit held in Dow Jones & Co. v. Department of Justice,[21] that documents transmitted to Congress do not qualify for Exemption 5 protection, based upon the simple fact that Congress is not an "agency" under

---

[17] Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989).

[18] Id. at 1123-24 (citing CNA Fin. Corp. v. Donovan, 830 F.2d at 1161). But cf. Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (embracing "functional test" but finding it not satisfied for documents submitted by private party not standing in any consultative or advisorial role with agency).

[19] See Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 10 (D.P.R. Sept. 22, 1988) (protecting confidential business information furnished to agency by business competitor); Information Acquisition Corp. v. Department of Justice, No. 77-839, slip op. at 4 (D.D.C. May 23, 1979) (protecting unsolicited comments from members of public on presidential nomination); see also FOIA Update, Summer 1987, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements"); FOIA Update, June 1982, at 10.

[20] See Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988) (witness statements taken from nonagency employees in contemplation of litigation held not intra-agency); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (Exemption 5 narrowly construed to apply "only to internal agency documents or documents prepared by outsiders who have a formal relationship with the agency"); Poss v. NLRB, 654 F.2d 659, 659 (10th Cir. 1977) (same); Kilroy v. NLRB, 633 F. Supp. 136, 140 (S.D. Ohio 1985) (witness statements taken from nonagency employees not intra-agency), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); see also Southam News v. INS, No. 85-2721, slip op. at 17 (D.D.C. May 18, 1989) (letters to and from private parties held not to meet threshold); Knight v. DOD, No. 87-480, slip op. at 2-3 (D.D.C. Dec. 7, 1987) (correspondence to contractors not intra-agency); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3 (D.D.C. July 22, 1983) (advice of professional advisory committees does not merit protection as disclosure would not chill outsiders' candor).

[21] 917 F.2d 571 (D.C. Cir. 1990).

the terms of the statute[22]--even though prior to Dow Jones, several district court decisions had accorded such documents protection under Exemption 5.[23] Nevertheless, the D.C. Circuit stated that agencies may "protect communications outside the agency so long as those communications are part and parcel of the agency's deliberative process."[24]

The issue remains unsettled as to documents generated in the course of settlement negotiations. Communications reflecting settlement negotiations between the government and an adverse party, which are of necessity exchanged between the parties, have been held not to constitute "intra-agency" memoranda under Exemption 5.[25] However, certain of those courts recognized the great difficulties inherent in such a harsh Exemption 5 construction, especially in light of the "logic and force of [the] policy plea" that the government's indispensable settlement mechanism can be impeded by such a result.[26]

Accordingly, one court has held that notes of an agency employee which reflected positions taken and issues raised in treaty negotiations were properly withheld pursuant to Exemption 5 because their release would harm the agency deliberative process.[27] Other courts have found the attorney work-product and deliberative process privileges to be properly invoked for documents prepared by agency personnel which reflected the substance of meetings between adverse

---

[22] Id. at 574 (citing 5 U.S.C. § 551(1)).

[23] See, e.g., Demetracopoulos v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,508, at 83,283 (D.D.C. Nov. 9, 1982) (documents transmitted to Congress); Letelier v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 82,257, at 82,714 (D.D.C. May 11, 1982) (same); see also FOIA Update, Spring 1983, at 5 (superseded in part by Dow Jones).

[24] 917 F.2d at 575.

[25] See County of Madison v. United States Dep't of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (privilege allowed under Exemption 4 but not under Exemption 5); NAACP Legal Defense & Educ. Fund, Inc. v. United States Dep't of Justice, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985); Norwood v. FAA, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (on motion for clarification and reconsideration); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983).

[26] County of Madison v. United States Dep't of Justice, 641 F.2d at 1040; Center for Auto Safety v. Department of Justice, 576 F. Supp. at 746 n.18 (quoting County of Madison v. United States Dep't of Justice, 641 F.2d at 1040); see also Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (public policy favoring compromise over confrontation would be "seriously undermined" if internal documents reflecting employees' thoughts during course of negotiations were released).

[27] Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982).

parties and agency personnel in preparation for eventual settlement of a case.[28] Furthermore, Justice Brennan, noting the need for protecting attorney work-product information, has specifically cited as a particular disclosure danger the ability of adverse parties to "gain insight into the agency's general strategic and tactical approach to deciding when suits are brought . . . and on what terms they may be settled."[29]

Thus, the law with respect to settlement documents stands in a state of flux, with repeated judicial suggestions underscoring the dangers of their disclosure, but with substantial case precedents standing as obstacles to Exemption 5 protection for those documents that have been shared with opposing parties. All of the adverse decisions in this area, though, have failed to take cognizance of the relatively recent development of a distinct "settlement negotiation" privilege.[30] In addition, settlement information may qualify for protection under Exemption 4 where the information meets the "commercial or financial" threshold,[31] or under the more traditional Exemption 5 privileges. Accordingly, while such information should be withheld by agencies at the administrative level pursuant to Exemption 5, particularly where strong policy interests militating against disclosure are present, special care should be taken to maximize the prospects of favorable case law development on this delicate issue.

Additionally, it is not the "hypothetical litigation" between particular par-

---

[28] See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege); Wilson v. Department of Justice, No. 87-2415, slip op. at 8-11 (D.D.C. June 14, 1992) (attorney work-product privilege); Oxy USA Inc. v. United States Dep't of Energy, No. 88-C-541-B (N.D. Okla. July 13, 1989) (deliberative process and attorney work-product privileges); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) (attorney work-product privilege), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (table cite); Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507, 513 (D. Kan. 1984) (deliberative process privilege); Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. at 620 (deliberative process privilege); see also FOIA Update, June 1982, at 10; cf. United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (draft consent decrees covered by both deliberative process and attorney work-product privileges; remanded for determination of whether privileges waived). But see Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (certain documents prepared by agency concerning negotiations failed to reveal any inter-agency deliberations and therefore were not withholdable).

[29] FTC v. Grolier Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (emphasis added).

[30] See, e.g., Olin Corp. v. Insurance Co. of N. America, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations").

[31] See M/A-COM Info. Sys. v. HHS, 656 F. Supp. at 692.

ties (in which relevance or need are appropriate factors) which governs the Exemption 5 inquiry;[32] rather, it is the circumstances in private litigation in which memoranda would "routinely be disclosed."[33] Therefore, whether the privilege invoked is absolute or qualified is of no significance.[34] Accordingly, no requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party.[35] Indeed, such an approach, combined with a pragmatic application of Exemption 5's threshold language, is the only means by which the Supreme Court's firm admonition against use of the FOIA to circumvent discovery privileges can be given full effect.[36] Nevertheless, the mere fact that information may not generally be discoverable does not necessarily mean that it is not discoverable by a specific class of parties in civil litigation. Just as the FOIA's privacy exemptions are not used against a first-party requester,[37] a privilege that is designed to protect a certain class of persons cannot be invoked against those persons as FOIA requesters.[38]

### Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions."[39] Specifically, three policy purpos-

---

[32] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 (1975).

[33] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

[34] See FTC v. Grolier Inc., 462 U.S. at 27; see also FOIA Update, Fall 1984, at 6.

[35] See FTC v. Grolier Inc., 462 U.S. at 28; NLRB v. Sears, Roebuck & Co., 421 U.S. at 149; see also, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987) ("the needs of a particular plaintiff are not relevant to the exemption's applicability"); Swisher v. Department of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (fact that privilege may be overcome by showing of "need" in civil discovery context in no way diminishes Exemption 5 applicability).

[36] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."); see also Martin v. Office of Special Counsel, 819 F.2d at 1186 (Where a requester is "unable to obtain those documents using ordinary civil discovery methods, . . . FOIA should not be read to alter that result.").

[37] See H.R. Rep. No. 1380, 93d Cong., 2d Sess. 13 (1974); see also FOIA Update, Spring 1989, at 4.

[38] See United States Dep't of Justice v. Julian, 486 U.S. at 13 (presentence report privilege, designed to protect reports' subjects, cannot be invoked against them as first-party requesters).

[39] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

es consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.[40]

Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."[41] In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.[42]

Indeed, in a major en banc decision, the Court of Appeals for the District of Columbia Circuit emphasized that even the mere status of an agency decision within an agency decisionmaking process may be protectible if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process . . . as well as the source of any decision."[43] This is particularly important to agencies involved in a regulatory process that specifically mandates public involvement in the decision process

---

[40] See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 23 (C.D. Cal. May 10, 1993) (release of predecisional documents may confuse public about agency policy and procedure). But see also ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1237-38 (D.C. Cir. 1983) (suggesting that otherwise exempt predecisional material "may" be ordered released so as to explain actual agency positions) (dictum), rev'd on other grounds, 466 U.S. 463 (1984).

[41] NLRB v. Sears, Roebuck & Co., 421 U.S. at 150.

[42] See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release."); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes--not to protect specific materials."); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 117 (D.D.C. 1984) (ongoing regulatory process would be subject to "delay and disrupt[ion]" if preliminary analyses were prematurely disclosed).

[43] Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

once the agency's deliberations are complete.[44] Moreover, the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision,[45] nor by the passage of time in general.[46]

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[47] First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."[48] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[49] The burden is upon the agency to show that the information in question satisfies both requirements.[50]

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."[51] On this point, the Supreme Court has been very clear:

---

[44] See id. at 776; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1120-21 (draft forest plans and preliminary draft environmental impact statements protected); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118 (preliminary scientific data generated in connection with study of chemical protected).

[45] See, e.g., May v. Department of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Cuccaro v. Secretary of Labor, 770 F.2d 355, 357 (3d Cir. 1985).

[46] See, e.g., Founding Church of Scientology v. Levi, 1 Gov't Disclosure Serv. (P-H) ¶ 80,155, at 80,374 (D.D.C. Aug. 12, 1980).

[47] See Mapother v. Department of Justice, No. 92-5261, slip op. at 7 (D.C. Cir. Sept. 17, 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))) (to be published).

[48] Jordan v. United States Dep't of Justice, 591 F.2d at 774.

[49] Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

[50] See Southam News v. INS, No. 85-2721, slip op. at 16-17 (D.D.C. May 18, 1989).

[51] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 559 (1st Cir. 1992); Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989); Knowles v. Thornburgh, No. 90-1294, slip op. at 5-6 (D.D.C. Mar. 11, 1992) (information generated during process preceding President's ultimate decision on application for clemency held predecisional).

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.[52]

Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, Exemption 5 can be applicable.[53] In a particularly instructive decision, Access Reports v. Department of Justice,[54] the D.C. Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes. Further, "predecisional" documents

---

[52] NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 n.18; see also Schell v. HHS, 843 F.2d at 941 ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use."); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118 ("[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take--of the deliberative process--by which the decision itself is made'"); Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) (court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise").

[53] See, e.g., Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., No. 89-2851, slip op. at 6 (D.D.C. July 20, 1992) (material prepared during compliance review that goes beyond critique of reviewed program to discuss broader agency policy held part of deliberative process) (appeal pending); Washington Post Co. v. DOD, No. 84-2949, slip op. at 21 (D.D.C. Feb. 25, 1987) (document generated in continuing process of examining agency policy falls within deliberative process); Ashley v. United States Dep't of Labor, 589 F. Supp. 901, 908-09 (D.D.C. 1983) (documents containing agency self-evaluations need not be shown to be part of clear process leading up to "assured" final decision so long as agency can demonstrate that documents were part of some deliberative process). But see also Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (suggesting agency must specify final "decisions to which the advice or recommendations . . . contributed"); Cook v. Watt, 597 F. Supp. 545, 550-52 (D. Alaska 1983) (confusingly refusing to extend privilege to documents originating in deliberative process merely because process held in abeyance and no decision reached). Compare Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (holding document must be "essential element" of deliberative process) with Schell v. HHS, 843 F.2d at 939-41 (appearing to reject, at least implicitly, "essential element" test).

[54] 926 F.2d 1192, 1196 (D.C. Cir. 1991); see also Taylor v. United States Dep't of the Treasury, No. C90-1928, slip op. at 3-4 (N.D. Cal. Jan. 20, 1991) (deliberative process privilege protects "communications leading to the actual enactment of a law, not merely communications preceding a decision to commence the process of amending a law").

are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority.[55]

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,[56] that implement an established policy of an agency,[57] or that explain actions that an agency has already taken.[58] Exemption 5 does not apply to postdecisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."[59]

Indeed, many courts have questioned whether certain documents at issue were tantamount to agency "secret law," i.e., "orders and interpretations which [the agency] actually applies to cases before it,"[60] and which are "routinely used by agency staff as guidance."[61] Such documents should be disclosed because they are not in fact predecisional, but rather "discuss established policies and decisions."[62] Only those portions of a postdecisional document that discuss predecisional recommendations not expressly adopted can be protected.[63]

---

[55] See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984).

[56] See, e.g., Taxation With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981).

[57] See, e.g., Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

[58] See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 153-54. But cf. Murphy v. TVA, 571 F. Supp. 502, 505 (D.D.C. 1983) (protection afforded to "interim" decisions which agency retains option of changing).

[59] NLRB v. Sears, Roebuck & Co., 421 U.S. at 152.

[60] Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

[61] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 869; see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983).

[62] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; Hansen v. United States Dep't of the Air Force, 817 F. Supp. at 124-25 (draft document used by agency as final product ordered disclosed).

[63] See NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 (holding postdecisional documents subject to deliberative process privilege "as long as prior communications and the ingredients of the decisionmaking process are not disclosed"); see also Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are.").

Several criteria have been fashioned to clarify the "often blurred" distinction between predecisional and postdecisional documents.[64] First, an agency should determine whether the document is a "final opinion" within the meaning of one of the automatic disclosure provisions of the FOIA, subsection (a)(2)(A).[65] In an extensive consideration of this point, the Court of Appeals for the Fifth Circuit held that, as section (a)(2)(A) specifies "the adjudication of [a] case[]," Congress intended "final opinions" to be only those decisions resulting from proceedings (such as that in Sears) in which a party invoked (and obtained a decision concerning) a specific statutory right of "general and uniform" applicability.[66]

Second, the nature of the decisionmaking authority vested in the office or person issuing the document must be considered.[67] If the author lacks "legal decision authority," the document is far more likely to be predecisional.[68] A crucial caveat in this regard, however, is that courts often look "beneath formal lines of authority to the reality of the decisionmaking process."[69] Hence, even an assertion by the agency that an official lacks ultimate decisionmaking authority might be "superficial" and unavailing if agency "practices" commonly accord decisionmaking authority to that official.[70] Conversely, an agency offi-

---

[64] Schlefer v. United States, 702 F.2d at 237; see generally ITT World Communications, Inc. v. FCC, 699 F.2d at 1235; Arthur Andersen & Co. v. IRS, 679 F.2d at 258-59.

[65] 5 U.S.C. § 552(a)(2)(A) (1988); see Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360-61 n.23 (1979).

[66] Skelton v. United States Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982). But see also Afshar v. Department of State, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983) (even single recommendation of no precedential value or applicability to rights of individual members of public loses protection if specifically adopted as basis for final decision).

[67] See Pfeiffer v. CIA, 721 F. Supp. at 340 ("What matters is that the person who issues the document has authority to speak finally and officially for the agency.").

[68] Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. at 184-85; see also Badhwar v. United States Dep't of the Air Force, 615 F. Supp. 698, 702-03 (D.D.C. 1985) (Air Force safety board does not make decisions, only recommendations), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); American Postal Workers Union v. Office of Special Counsel, No. 85-3691, slip op. at 6 (D.D.C. June 24, 1986) (prosecutorial recommendations to special counsel which were not binding or dispositive considered predecisional).

[69] Schlefer v. United States, 702 F.2d at 238; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1123.

[70] Schlefer v. United States, 702 F.2d at 238, 241; see, e.g., Badran v. United States Dep't of Justice, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987) (INS (continued...)

cial who appears to have final authority may in fact not have such authority or may not be wielding that authority in a particular situation.[71]

Careful analysis of the decisionmaking process is sometimes required to determine whether the records reflect an earlier preliminary decision or recommendations concerning follow-up issues,[72] or whether the document sought reflects a final decision or merely advice to a higher authority.[73] Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress are predecisional,[74] but descriptions of "agency efforts to ensure enactment of policies already established" are postdecisional.[75]

Third, it is useful to examine the direction in which the document flows

---

[70](...continued)
decision on plaintiff's bond was final, even though it was reviewable by immigration judge, because "immigration judges are independent from the INS, and no review of plaintiff's bond occurred within the INS").

[71] See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1122-23 (headquarters' comments on regional plans held to be opinions and recommendations); Jowett, Inc. v. Department of the Navy, 729 F. Supp. at 874 (audit reports prepared by entity lacking final decisionmaking authority held protectible).

[72] See, e.g., City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1254 (protecting documents discussing past decision as it impacts on future decision); Access Reports v. Department of Justice, 926 F.2d at 1196 (staff attorney memo on how proposed FOIA amendments would affect future cases not postdecisional working law but opinion on how to handle pending legislative process); Hamrick v. Department of the Navy, No. 90-283, slip op. at 4 (D.D.C. Aug. 28, 1992) ("[D]ocuments prepared after [agency's] decision to dual source the F404 engines are not 'formal agency policy,' but, recommendations for future decisions relating to F404 procurement based upon lessons learned from the dual sourcing decisionmaking process."); Coyote Valley Band of Pomo Indians v. United States, No. 87-2786, slip op. at 4 (N.D. Cal. Nov. 6, 1987); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 574-75 (D.D.C. 1984).

[73] See, e.g., Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d at 1497; American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1276 (D.D.C. 1986), remanded on other grounds, No. 86-5390 (D.C. Cir. Dec. 9, 1987).

[74] See Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d at 1497.

[75] Dow, Lohnes & Albertson v. USIA, No. 82-2569, slip op. at 15-16 (D.D.C. June 5, 1984), vacated in part, No. 84-5852 (D.C. Cir. Apr. 17, 1985); see also Badhwar v. United States Dep't of Justice, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken.").

along the decisionmaking chain. Naturally, a document "from a subordinate to a superior official is more likely to be predecisional,"[76] than is the contrary case: "[F]inal opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy."[77] However, under certain circumstances, recommendations can flow from the superior to the subordinate.[78] Perhaps most important of all is to consider the "'role, if any, that the document plays in the process of agency deliberations.'"[79]

Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference."[80] At least one court, though, has suggested a less stringent standard of "formal or informal adoption."[81] Also, although mere "approval" of a predecisional document does not necessarily constitute adoption of it,[82] an inference of incorporation or adoption has twice been found to exist where a decisionmaker accepted

---

[76] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; see also Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) ("recommendation to a supervisor on how to proceed is predecisonal by nature"); MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 9-10 (D.D.C. Mar. 25, 1992) (guidelines developed by panel members making recommendations, not final decisionmaker, held predecisional); Government Accountability Project v. Office of Special Counsel, No. 87-235, slip op. at 5-6 (D.D.C. Feb. 22, 1988) (protected documents "plainly contain advisory positions adopted by officials subordinate in rank to the final decisionmakers").

[77] Brinton v. Department of State, 636 F.2d at 605; see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. at 1276; Ashley v. United States Dep't of Labor, 589 F. Supp. at 908.

[78] See National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1123 (comments from headquarters to regional office found, under circumstances presented, to be advisory rather than directory).

[79] Formaldehyde Inst. v. HHS, 889 F.2d at 1122 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988)) (emphasis added).

[80] NLRB v. Sears, Roebuck & Co., 421 U.S. at 161; see also Atkin v. EEOC, No. 91-2508, slip op. at 23-24 (D.N.J. July 14, 1993) (recommendation to close file not protectible where contained in agency's actual decision to close file); Afshar v. Department of State, 702 F.2d at 1140.

[81] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; see also American Soc'y of Pension Actuaries v. IRS, 746 F. Supp. 188, 192 (D.D.C. 1990) (ordering disclosure after finding that IRS's budget assumptions and calculations underlying final estimate for President's budget were "implicitly adopted" by government); Skelton v. United States Postal Serv., 678 F.2d at 39 n.5 (dictum).

[82] See, e.g., American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308, 1311 (D.D.C. 1977).

a staff recommendation without giving a statement of reasons.[83] Where it is unclear whether a recommendation provided the basis for a final decision, the recommendation should be protectible.[84]

A second primary limitation on the scope of the deliberative process privilege is that of course it applies only to "deliberative" documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda.[85] Not only would factual material "generally be available for discovery,"[86] but its release usually will not threaten consultative agency functions.[87] This seemingly straightforward distinction between deliberative and factual materials can blur, however, where the facts themselves reflect the agency's deliberative process[88]--which has prompted the D.C. Circuit to observe that "the use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases."[89] In fact, the full D.C. Circuit has firmly declared that factual information should be examined "in light of the policies and goals that underlie" the privilege and "the context in which the materials are used."[90]

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise

---

[83] See American Soc'y of Pension Actuaries v. IRS, 746 F. Supp. at 191; Martin v. MSPB, 3 Gov't Disclosure Serv. (P-H) ¶ 82,416, at 83,044 (D.D.C. Sept. 14, 1982). But see American Postal Workers Union v. Office of Special Counsel, slip op. at 7-9 (incorporation not inferred).

[84] See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. at 184-85; Afshar v. Department of State, 702 F.2d at 1143 n.22; see also Africa Fund v. Mosbacher, No. 92-289, slip op. at 19 (S.D.N.Y. May 26, 1993) (record did not suggest either "adoption" or "final opinion" of agency); Wiley, Rein & Fielding v. United States Dep't of Commerce, No. 90-1754, slip op. at 6 (D.D.C. Nov. 27, 1990) ("Denying protection to a document simply because the document expresses the same conclusion reached by the ultimate agency decision-maker would eviscerate Exemption 5."); Ahearn v. United States Army Materials & Mechanics Research Ctr., 580 F. Supp. 1405, 1407 (D. Mass. 1984).

[85] See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 867.

[86] EPA v. Mink, 410 U.S. 73, 87-88 (1973).

[87] See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974).

[88] See, e.g. Skelton v. United States Postal Serv., 678 F.2d at 38-39.

[89] Dudman v. Department of Air Force, 815 F.2d at 1568.

[90] Wolfe v. HHS, 839 F.2d at 774; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1119 ("ultimate objective" of Exemption 5 is to safeguard agency's deliberative process).

"deliberative" document under two general types of circumstances.[91] The first circumstance occurs where the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. In Montrose Chemical Corp. v. Train, for example, the summary of a large volume of public testimony compiled to facilitate the EPA Administrator's decision on a particular matter was held to be part of the agency's internal deliberative process.[92] The very act of distilling the testimony, of separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel.[93] Such "selective" facts are therefore entitled to the same protection as that afforded to purely deliberative materials, as their release would "permit indirect inquiry into the mental processes,"[94] and so "expose" predecisional agency deliberations.[95] Thus, to protect the factual materials, an agency must identify a process which "could reasonably be construed as predecisional and deliberative."[96]

A recent D.C. Circuit opinion concerning a report consisting of factual

---

[91] See FOIA Update, Summer 1986, at 6.

[92] See 491 F.2d at 71.

[93] See id. at 68; see, e.g., Atkin v. EEOC, slip op. at 21 (staff selection of certain factual documents to be used for report preparation held deliberative); Bentson Contracting Co. v. NLRB, No. 90-451, slip op. at 3 (D. Ariz. Dec. 28, 1990) (document characterizing issues most important to parties and how factual framework is utilized to determine precedent used in rendering decision held deliberative).

[94] Williams v. United States Dep't of Justice, 556 F. Supp. at 65.

[95] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 256; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 562 (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus. Ass'n v. OSHA, 610 F.2d at 85 (disclosing factual segments of summaries would reveal deliberative process by "demonstrating which facts in the massive rule-making record were considered significant to the decisionmaker"); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1373 (E.D.N.C. 1986) (list of farmworker camps was "selective fact" and thus protected); Sorensen v. United States Dep't of Agric., No. 83-4143, slip op. at 7 (D. Idaho Mar. 11, 1985) (document comprising agency's "attempt to organize, evaluate and prioritize the facts of importance" held exempt).

[96] City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1255; see also ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1239 (D.C. Cir. 1983) (notes must be more than "straightforwarad factual narrations" to be protected); Playboy Enters. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) (factual materials must be generated in course of agency's decisionmaking process); Lacy v. United States Dep't of the Navy, 593 F. Supp. 71, 78 (D. Md. 1984) (photographs attached to deliberative report "do not become part of the deliberative process merely because some photographs were selected and others were not").

materials prepared for a decision by the Attorney General as to whether to allow former U.N. Secretary General Kurt Waldheim to enter the United States provides an illustration of the factual/deliberative distinction.[97] The D.C. Circuit found that "the majority of the Waldheim Report's factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," and that it therefore fell within the deliberative process privilege.[98] By contrast, it also held that a chronology of Waldheim's military career was not deliberative, as it was "neither more nor less than a comprehensive collection of the essential facts" and "reflect[ed] no point of view."[99]

The second such circumstance is where the information is so inextricably connected to the deliberative material that its disclosure will expose or cause harm to the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld.[100] In a recent example, the D.C. Circuit held that the deliberative process privilege protects construction cost estimates, which the court characterized as "elastic facts," finding that their disclosure would reveal the agency's deliberations.[101]

Similarly, where factual or statistical information is actually an expression of deliberative communications it may be withheld on the basis that to reveal

---

[97] Mapother v. Department of Justice, slip op. at 9-12.

[98] Id. at 11 (distinguishing and confining Playboy as a report designed only to inform Attorney General of facts he would make available to Member of Congress, rather than one involving any decision he would have to make); see also City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1255 (similarly observing that in Playboy "[the] agency identified no decision in relation to the withheld investigative report").

[99] Mapother, slip op. at 12.

[100] See, e.g., Wolfe v. HHS, 839 F.2d at 774-76 ("fact" of status of proposal in deliberative process protected); Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (release of summaries of negotiations would inhibit free flow of information as "summaries are not simply the facts themselves"); Jowett, Inc. v. Department of the Navy, 729 F. Supp. at 877 (manner of selecting and presenting even most factual segments of audit reports would reveal process by which agency's final decision is made); Washington Post Co. v. DOD, No. 84-2403, slip op. at 5 (D.D.C. Apr. 15, 1988) (factual assertions in briefing documents found "thoroughly intertwined" with opinions and impressions); Washington Post Co. v. DOD, No. 84-2949, slip op. at 23 (summaries and lists of materials relied upon in drafting report found "inextricably intertwined with the policymaking process").

[101] Quarles v. Department of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990).

that information would reveal the agency's deliberations.[102] Exemption 5 thus protects scientific reports that constitute the interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."[103] The government interest in withholding technical data is heightened if such material is requested at a time when disclosure of a scientist's "nascent thoughts . . . would discourage the intellectual risktaking so essential to technical progress."[104] Moreover, it is noteworthy that the D.C. Circuit has stated that the "results of . . . factual investigations" may be within the protective scope of Exemption 5.[105] However, the D.C. Circuit also has emphasized that agencies bear the burden of demonstrating that disclosure of such information "would actually inhibit candor in the decision-making process."[106]

Documents that are commonly encompassed by the deliberative process privilege include "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,"[107] the release of which would be likely to "stifle honest and

---

[102] See, e.g., SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-481, slip op. at 3 (D.D.C. Mar. 31, 1989) (technical scores and technical rankings of competing contract bidders held predecisional and deliberative); National Wildlife Fed'n v. United States Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (variables reflected in computer program's mathematical equation held protectible); American Whitewater Affiliation v. Federal Energy Regulatory Comm'n, No. 86-1917, slip op. at 7 (D.D.C. Dec. 2, 1986) ("the cost and energy comparisons involved in this case are deliberative"); Brinderson Constructors, Inc. v. United States Army Corps of Eng'rs, No. 85-905, slip op. at 11 (D.D.C. June 11, 1986) ("computations are certainly part of the deliberative process"); Professional Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (scores used to rate procurement proposals may be "numerical expressions of opinion rather than 'facts'").

[103] Parke, Davis & Co. v. Califano, 623 F.2d at 6; see also Quarles v. Department of the Navy, 893 F.2d at 392-93 (cost estimates held protectible as "elastic facts"); National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1120 ("opinions on facts and their [sic] consequences of those facts form the grist for the policymaker's mill"). But see Ethyl Corp. v. EPA, 478 F.2d 47, 50 (4th Cir. 1973) (characterizing such material as "technological data of a purely factual nature").

[104] Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118.

[105] Paisley v. CIA, 712 F.2d 686, 698 n.53 (D.C. Cir. 1983) (dictum).

[106] Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (agencies must show how process would be harmed where some factual material was released and similar factual material was withheld).

[107] NLRB v. Sears, Roebuck & Co., 421 U.S. at 150; see also National (continued...)

frank communication within the agency."[108] Accordingly, though the case law is not yet entirely settled on the point, "briefing materials"--such as reports or other documents which summarize issues and advise superiors--should be protectible under the deliberative process privilege.[109]

A particular category of documents likely to be found exempt under the deliberative process privilege is "drafts,"[110] although it has been observed that such a designation "does not end the inquiry."[111] It should be remembered,

---

[107](...continued)
Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1121 ("Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process."); Four Corners Action Coalition v. United States Dep't of the Interior, No. 92-Z-2106, transcript at 4-5 (D. Colo. Dec. 9, 1992) (bench order) (marginal notes and editorial comments reflect deliberative process); Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 9 (D.N.M. June 22, 1991) (notes written in margins of documents constitute deliberations of documents' recipient); Jowett, Inc. v. Department of the Navy, 729 F. Supp. 871, 875 (D.D.C. 1989) (documents that are "part of the give-and-take between government entities"); Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989) (meeting notes that reflect the exchange of opinions or give-and-take between agency personnel or divisions of agency), aff'd sub nom. Strang v. Desio, 899 F.2d 1268 (D.C. Cir. 1990) (table cite).

[108] Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; see also Schell v. HHS, 843 F.2d at 942 ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.").

[109] See Access Reports v. Department of Justice, 926 F.2d at 1196-97 (dictum); Washington Post Co. v. DOD, slip op. at 23 (summaries and lists of material compiled for general's report preparation held protectible); Williams v. United States Dep't of Justice, 556 F. Supp. 63, 65 (D.D.C. 1982) ("briefing papers prepared for the Attorney General prior to an appearance before a congressional committee" held protectible); see also FOIA Update, Fall 1988, at 5. Contra National Sec. Archive v. FBI, No. 88-1507, slip op. at 3-5 (D.D.C. Apr. 15, 1993) (briefing papers found not protectible) (appeal pending).

[110] See, e.g., City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1253; Town of Norfolk v. United States Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1569; Russell v. Department of the Air Force, 682 F.2d at 1048; Arthur Andersen & Co. v. IRS, 679 F.2d 254, 259 (D.C. Cir. 1982); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 85-86 (2d Cir. 1979); Lyons v. OSHA, No. 88-1562, slip op. at 4 (D. Mass. Dec. 2, 1991); Exxon Corp. v. Department of Energy, 585 F. Supp. at 698.

[111] Arthur Andersen & Co. v. IRS, 679 F.2d at 257 (citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866); see Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d at 1436 n.8 (suggesting new harm standard for "mundane," nonpolicy-oriented documents, which can
(continued...)

though, that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.[112] As a result, Exemption 5 protection can be available to a draft document regardless of whether it differs from its final version.[113]

Two years ago, the factual/deliberative distinction led to sharply contrasting decisions by two circuit courts of appeal, where the issue was the Commerce Department's withholding of numeric material.[114] Both the Assembly of the State of California and the Florida House of Representatives sought "adjusted" census figures for their respective states that were developed in the event that the Secretary of Commerce decided to adjust the 1990 census, an event that did not occur.[115] The Court of Appeals for the Eleventh Circuit applied a rigid "fact or opinion" test in determining whether such numerical

---

[111](...continued)
include drafts); see also Hansen v. United States Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (unpublished internal document lost draft status when consistently treated by agency as finished product over many years).

[112] See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1122 ("To the extent that [the requester] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted . . . , it is attempting to probe the editorial and policy judgments of the decisionmakers."); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1568-69; Russell v. Department of the Air Force, 682 F.2d at 1048-50; Pies v. IRS, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981); Rothschild v. CIA, No. 91-1314, slip op. at 6-7 (D.D.C. Mar. 25, 1992) (extending protection to "marginalia consisting of comments, opinions, further relevant information and associated notes" on drafts); Oxy USA Inc. v. United States Dep't of Energy, No. 88-C-541-B, slip op. at 5 (N.D. Okla. July 13, 1989) (agency need not show extent to which draft differs from final document, because to do so would itself expose what occurred in deliberative process); Strang v. Collyer, 710 F. Supp. at 12; Exxon Corp. v. Department of Energy, 585 F. Supp. at 698; see also FOIA Update, Spring 1986, at 2; FOIA Update, Jan. 1983, at 6.

[113] See Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta); Lead Indus. Ass'n v. OSHA, 610 F.2d at 86; see also Exxon Corp. v. Department of Energy, 585 F. Supp. at 698; City of W. Chicago v. NRC, 547 F. Supp. 740, 751 (N.D. Ill. 1982); FOIA Update, Spring 1986, at 2. But see Texaco, Inc. v. United States Dep't of Energy, 2 Gov't Disclosure Serv. (P-H) ¶ 81,296, at 81,833 (D.D.C. Oct. 13, 1981) (aberrational ruling, without analysis, to the contrary).

[114] Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992); Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992).

[115] Assembly of Cal., 968 F.2d at 917-18; Florida House of Representatives, 961 F.2d at 943-44.

data are protectible.[116] It viewed the census data as "opinion" that was ultimately rejected by the decisionmaker and therefore held them to be withholdable pursuant to the deliberative process privilege.[117] The Court of Appeals for the Ninth Circuit, on the other hand, applied a "functional" test under which it found that the data, on "the continuum of deliberation and fact . . . , fell closer to fact."[118] The Ninth Circuit ordered the California data released on the basis that disclosure would not reveal any of the Department of Commerce's deliberative processes.[119] Since neither case went to the Supreme Court, this narrow conflict remains.

This past year, in a case involving purely factual data found not to fall within the deliberative process privilege, Petroleum Information Corp. v. United States Department of the Interior, the D.C. Circuit strongly indicated that such information should be shielded by the privilege or not according to whether it involves "some policy matter."[120] It focused on "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents,"[121] while at the same time suggesting that more "mundane" documents should be protected where "disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future."[122] While it remains to be seen exactly how this emerging "policy" focus will be applied by the courts in future cases,[123] at a minimum it provides a focal point for the exercise of sound administrative dis-

---

[116] Florida House of Representatives, 961 F.2d at 950.

[117] Id.

[118] Assembly of Cal., 968 F.2d at 921-22.

[119] Id. at 923.

[120] Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d at 1435.

[121] Id. at 1436.

[122] Id. at 1436 n.8; accord Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1071, 1072 (concluding that "potentially harmful" factual information could be withheld if it were determined that it "would actually inhibit candor in the decision-making process if made available to the public").

[123] See Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., No. 89-2851, slip op. at 5-6 (D.D.C. July 20, 1992) (agency's "routine review" of state compliance and "assess[ment of] how well existing policies are being implemented by the state" held not protectible because they "do not suggest or recommend future agency policy") (appeal pending); accord Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., slip op. at 2 (same); see also Mapother v. Department of Justice, slip op. at 8-10 (discussing and harmonizing existing D.C. Circuit case law); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1070 (pointing to "process by which decisions and policies" are formulated).

cretion in the application of the deliberative process privilege on a case-by-case basis. (See Discretionary Disclosure and Waiver, below, for a discussion of discretionary disclosure in connection with Exemption 5.)

Lastly, the protection of the very integrity of the deliberative process can, in some contexts, be the basis for protecting factual information.[124] It also should be noted that under some circumstances disclosure of even the identity of the author of a deliberative document could chill the deliberative process, thus warranting protection of that identity under Exemption 5.[125] One court has noted that the danger of revealing the agency's deliberations by disclosing facts is particularly acute where the document withheld is "short."[126] Factual information within a deliberative document may be withheld also where it is impossible to reasonably segregate meaningful portions of that factual information from the deliberative information.[127]

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation.[128] As its purpose is to protect the adversarial trial process by insulating the attorney's preparation

---

[124] See, e.g., Wolfe v. HHS, 839 F.2d at 776 (revealing status of proposal in deliberative process "could chill discussions at a time when agency opinions are fluid and tentative"); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1568 (revealing editorial judgments would stifle creative thinking).

[125] See, e.g., Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Miscavige v. IRS, No. 91-1638, slip op. at 8 (N.D. Ga. June 15, 1992); see also FOIA Update, Spring 1985, at 6; cf. Wolfe v. HHS, 839 F.2d at 775-76 (discussing how particularized disclosure can chill agency discussions).

[126] Nadler v. United States Dep't of Justice, 955 F.2d at 1491 (dicta) (considering document "one and one-half pages in length").

[127] See Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (short document would be rendered "nonsensical" by segregation); see also Lead Indus. Ass'n v. OSHA, 610 F.2d at 86 ("Instead of merely combing the documents for 'purely factual' tidbits, the court should have considered the segments in the context of the whole document and that document's relation to the administrative process."); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. at 1375 (impossible to "reasonably" segregate nondeliberative material from autopsy report); Morton-Norwich Prods., Inc. v. Mathews, 415 F. Supp. 78, 82 (D.D.C. 1976). But see also Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1070 (emphasizing agency obligation to specifically address possible segregability and disclosure of factual information).

[128] See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3).

from scrutiny,[129] the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.[130] The privilege is not limited to civil proceedings, but rather extends to administrative proceedings,[131] and to criminal matters as well.[132] Similarly, the privilege has also been held applicable to documents generated in preparation of an amicus brief.[133]

The privilege sweeps broadly in several respects.[134] First, litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable.[135] Significantly, the Court of Appeals for the District of Columbia Circuit has ruled that the privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."[136] The privilege also has been held to attach to law enforcement investigations, where the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer."[137]

---

[129] See Jordan v. United States Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc).

[130] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

[131] See, e.g., Exxon Corp. v. Department of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983); see also Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (same result under Exemption (d)(5) of Privacy Act).

[132] See, e.g., Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983); see also FOIA Update, Spring 1984, at 7. But cf. Powell v. Department of Justice, 584 F. Supp. 1508, 1520 (N.D. Cal. 1984) (suggesting, but not deciding, that attorney work-product materials generated in criminal case should be subject to disclosure under criminal discovery provisions).

[133] See Strang v. Collyer, 710 F. Supp. 9, 12-13 (D.D.C. 1989), aff'd sub nom. Strang v. Desio, 899 F.2d 1268 (D.C. Cir. 1990) (table cite).

[134] See generally FOIA Update, Summer 1983, at 6.

[135] See Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976); see, e.g., Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, slip op. at 10-11 (N.D. Ill. Oct. 6, 1992) (privilege applies to legal advice given for specific agency clean-up sites); Savada v. DOD, 755 F. Supp. 6, 7 (D.D.C. 1991) (threat of litigation by counsel for adverse party held sufficient).

[136] Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992); see also Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (privilege extends to documents prepared when identity of prospective litigation opponent unknown).

[137] SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991).

However, the mere fact that it is conceivable that litigation may occur at some unspecified time in the future will not necessarily be sufficient to protect attorney-generated documents; "the policies of the FOIA would be largely defeated" if agencies were to withhold any documents created by attorneys "simply because litigation might someday occur."[138] But where litigation is inevitable, a specific claim need not yet have arisen.[139]

Further, it has been held that a document prepared for two disparate purposes was compiled in anticipation of litigation if "litigation was a major factor" in the decision to create it.[140] However, documents prepared in an agency's ordinary course of business, not sufficiently related to litigation, may not be accorded protection.[141]

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.[142] Logically, it can

---

[138] Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987) (citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 865).

[139] See Schiller v. NLRB, 964 F.2d at 1208 (documents that provide tips and instructions for handling future litigation held protectible); Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d at 127 (memoranda that "advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency and the likely outcome" held protectible); Lacefield v. United States, No. 92-N-1680, slip op. at 14 (D. Colo. Mar. 10, 1993) (knowledge that adversary plans to challenge agency position constitutes articulable claim); Silber v. United States Dep't of Justice, No. 91-876, transcript at 23-24 (D.D.C. Aug. 13, 1992) (bench order) (privilege covers monograph written to assist attorneys in prosecuting cases); Anderson v. United States Parole Comm'n, 3 Gov't Disclosure Serv. (P-H) ¶ 83,055, at 83,557 (D.D.C. Jan. 6, 1983) (privilege covers case digest of legal theories and defenses frequently used in litigation); Automobile Importers of America, Inc. v. FTC, 3 Gov't Disclosure Serv. (P-H) ¶ 82,488, at 83,226 (D.D.C. Sept. 28, 1982) (privilege protects set of agency options and considerations used in auto-safety enforcement proceedings).

[140] Wilson v. Department of Energy, No. 84-3163, slip op. at 7 n.1 (D.D.C. Jan. 28, 1985). But see also United States v. Gulf Oil Corp., 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985) (holding that anticipation of litigation must be "the primary motivating purpose behind the creation of the document") (non-FOIA case).

[141] See Hill Tower, Inc. v. Department of the Navy, 718 F. Supp. 562, 567 (N.D. Tex. 1988) (aircraft accident investigation information in JAG Manual report not created in anticipation of litigation).

[142] See, e.g., United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (remanded to determine if privilege was waived); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (table cite); Church of Scientology v. IRS, No. 90-
(continued...)

also protect the recommendation to close litigation,[143] and even the final agency decision to terminate litigation.[144] But documents prepared subsequent to the closing of a case are presumed, absent some specific basis for concluding otherwise, not to have been prepared in anticipation of litigation.[145] Moreover, one court has even held that documents not originally prepared in anticipation of litigation cannot assume the protection derived from the work-product privilege merely by their later placement in a litigation-related document.[146]

Second, Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." Not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by the Department of Justice qualify for the privilege,[147] but also documents prepared by an attorney "not employed as a litigator."[148] Courts have looked at the plain meaning of the rule and have extended work-product protection to materials prepared by nonattorneys who are supervised by attorneys.[149] The unstated assumption in such cases is that

---

[142](...continued)
11069, slip op. at 20 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (fact that parties were contemplating settlement does not foreclose application of attorney work-product privilege); cf. Carey-Canada, Inc. v. Aetna Casualty & Sur. Co., 118 F.R.D. 250, 251-52 (D.D.C. 1987) (civil discovery context).

[143] See A. Michael's Piano, Inc. v. FTC, No. 2:92 CV 00603, slip op. at 1 (D. Conn. Jan. 29, 1993) (even if staff attorney is considering or recommending closing an investigation, exemption still applies) (appeal pending).

[144] See FOIA Update, Summer 1985, at 5.

[145] See Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 586; see also, e.g., Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 20 (D.D.C. May 13, 1992) (finding reasonable anticipation of litigation where case was closed but where agency was carefully reevaluating it in light of new evidence).

[146] Dow Jones & Co. v. Department of Justice, 724 F. Supp. 985, 989 (D.D.C. 1989), aff'd on other grounds, 917 F.2d 571 (D.C. Cir. 1990).

[147] See, e.g., Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983).

[148] Illinois State Bd. of Educ. v. Bell, No. 84-337, slip op. at 9-10 (D.D.C. May 31, 1985).

[149] See, e.g., Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 6-7 (D.D.C. Aug. 17, 1993) (material prepared by government personnel under prosecuting attorney's direction) (to be published); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 17 (D. Colo. Mar. 22, 1993) (telephone interview conducted by examiner at request of attorney); Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 9-10 (D. Mont. Sept. 9, 1988) (water studies produced by contract companies); Nishnic v.
(continued...)

work-product protection is appropriate where the nonattorney acts as the agent of the attorney; where that is not the case, the work-product privilege as incorporated by the FOIA has not been extended to protect the material prepared by the nonattorney.[150]

Third, the work-product privilege has been held to remain applicable where the information has been shared with a party holding a common interest with the agency.[151] The privilege remains applicable even where the document has become the basis for a final agency decision.[152]

---

[149](...continued)
United States Dep't of Justice, 671 F. Supp. 771, 772-73 (D.D.C. 1987) (historian's research and interviews); Wilson v. Department of Energy, slip op. at 8 (consultant's report); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1099 (D.D.C. 1978) (economist's report), aff'd, 663 F.2d 120 (D.C. Cir. 1980). But cf. Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 7-8 (D.D.C. Mar. 12, 1993) (confusing attorney-work product privilege and deliberative process privilege to hold that witness statements taken by investigator at behest of counsel cannot be protected because they would "not expose agency decision making process").

[150] See Hall v. Department of Justice, No. 87-474, slip op. at 17-19 (D.D.C. Mar. 8, 1989) (magistrate's recommendation) (agency's affidavit failed to show that prosecutorial report of investigation was prepared by Marshals Service personnel under direction of attorney), adopted (D.D.C. July 31, 1989); Nishnic v. United States Dep't of Justice, 671 F. Supp. at 810-11 (summaries of witness statements taken by USSR officials for United States Department of Justice held not protectible).

[151] See United States v. Gulf Oil Corp., 760 F.2d at 295-96 (documents shared between two companies contemplating merger); Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982); Nishnic v. United States Dep't of Justice, No. 86-2802, slip op. at 10 (D.D.C. May 15, 1987) (documents shared with foreign nation). But see also Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (communications between agency and interested nonagency held not protectible because nonagency "did not stand in any consultative or advisorial role" to agency).

[152] See Uribe v. Executive Office for United States Attorneys, No. 87-1836, slip op. at 5-6 (D.D.C. May 23, 1989) (criminal "prosecution declination memorandum" protected) (citing FTC v. Grolier Inc., 462 U.S. 19 (1983)); Iglesias v. CIA, 525 F. Supp. 547, 549 (D.D.C. 1981); FOIA Update, Summer 1985, at 5; see also Federal Open Mkt. Comm. v. Merrill, 434 U.S. 340, 360 n.23 (1979) (protecting final determination under commercial privilege); cf. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (holding that memoranda reflecting agency decision to prosecute party do not constitute "final disposition" of "case" within the meaning of subsection (a)(2) of FOIA). But see FTC v. Grolier Inc., 462 U.S. at 32 n.4 (Brennan, J., concurring) ("[I]t is difficult to imagine how a final decision could be 'prepared in anticipation of litigation or for trial.'").

In NLRB v. Sears, Roebuck & Co.,[153] the Supreme Court allowed the withholding of a final agency decision on the basis that it was shielded by the work-product privilege,[154] but it also stated that Exemption 5 can never apply to final decisions and it expressed reluctance to "construe Exemption 5 to apply to documents described in 5 U.S.C. § 552(a)(2),"[155] the "reading room" provision of the FOIA.[156] This result led to considerable confusion,[157] which was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.[158] In Merrill, the Court explained its statements in Sears,[159] and plainly stated that even if a document is a final opinion, and therefore falls within subsection (a)(2)'s mandatory disclosure requirements, it may still be withheld if it falls within the work-product privilege.[160]

Fourth, the Supreme Court's decisions in United States v. Weber Aircraft Corp.[161] and FTC v. Grolier Inc.,[162] viewed in light of the traditional contours of the attorney work-product doctrine, afford sweeping attorney work-product protection to factual materials. Because factual work-product enjoys qualified immunity from civil discovery, such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship."[163] In Grolier, the Supreme Court held that the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of

---

[153] 421 U.S. 132 (1975).

[154] Id. at 160.

[155] Id. at 153-54.

[156] See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

[157] See, e.g., Bristol-Meyers Co. v. FTC, 598 F.2d 18, 24 n.11, 29 (D.C. Cir. 1978).

[158] 443 U.S. 340 (1979).

[159] Id. at 360 n.23 (clarifying that Sears observations were made in relation to privilege for predecisional communications only).

[160] Id. ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."). But see also SafeCard Servs., Inc. v. SEC, 926 F.2d at 1203-05, 1206 (mistakenly applying Bristol-Meyers, a pre-Merrill decision, in requiring release of work-product that memorializes final decision).

[161] 465 U.S. 792 (1984).

[162] 462 U.S. 19 (1983).

[163] Fed. R. Civ. P. 26(b)(3).

relevance."[164] Because the rules of civil discovery require a showing of "substantial need" and "undue hardship" in order for a party to obtain any factual work-product,[165] such material is not "routinely" or "normally" discoverable. This "routinely or normally discoverable" test was unanimously reaffirmed by the Supreme Court in WeberAircraft.[166]

Although several pre-Weber Aircraft circuit court decisions mistakenly limited attorney work-product protection to "deliberative" material,[167] no distinction between factual and deliberative work-product should be applied. This broad view of the privilege has been expressed by several courts, including the D.C. Circuit, to clarify once and for all that factual information is fully entitled to work-product protection.[168]

A collateral issue is the applicability of the attorney work-product privilege to witness statements. Within the civil discovery context, the Supreme

---

[164] 462 U.S. at 26. See also NLRB v. Sears, Roebuck & Co., 421 U.S. at 149 & n.16.

[165] Fed. R. Civ. P. 26(b)(3).

[166] 465 U.S. at 799.

[167] See Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 735 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); Deering Milliken Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977); Title Guar. Co. v. NLRB, 534 F.2d 484, 492-93 n.15 (2d Cir.), cert. denied, 429 U.S. 834 (1976).

[168] Martin v. Office of Special Counsel, 819 F.2d at 1187 ("The work-product privilege simply does not distinguish between factual and deliberative material."); see also Norwood v. FAA, 993 F.2d 570, 576 (6th Cir. 1993) (work-product privilege protects documents regardless of status as factual or deliberative); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1492 (11th Cir. 1992) ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials."); Manchester v. DEA, 823 F. Supp. 1259, 1269 (E.D. Pa. 1993) (segregation not required where "factual information is incidental to, and bound with, privileged" information); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 814 (D.N.J. 1993) (following Martin); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 21-22 (D. Mass. Nov. 12, 1992) (documents need not show litigative strategy to be withheld in full); Wilson v. Department of Justice, No. 87-2415, slip op. at 5-6 (D.D.C. June 17, 1991) (work-product privilege covers entire document); Jochen v. Office of Special Counsel, No. 86-4765, slip op. at 4 (C.D. Cal. Feb. 4, 1987); Pennsylvania Dep't of Pub. Welfare v. HHS, 623 F. Supp. 301, 307 (M.D. Pa. 1985); United Technologies Corp. v. NLRB, 632 F. Supp. 776, 781 (D. Conn. 1985) ("if a document is attorney work product the entire document is privileged"), aff'd on other grounds, 777 F.2d 90 (2d Cir. 1985); Christmann & Weborn v. Department of Energy, 589 F. Supp. 584, 586 (N.D. Tex. 1984) (citing Weber Aircraft), aff'd, 768 F.2d 1348 (5th Cir. 1985) (table cite); accord FOIA Update, Fall 1984, at 6. Contra Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 8-12 (D.N.M. Aug. 27, 1993) (refusing to follow Martin).

Court has recognized at least a qualified privilege from civil discovery for such documents, i.e., such material was held discoverable only upon a showing of necessity and justification.[169] Applying the "routinely and normally discoverable" test of Grolier and Weber Aircraft, the D.C. Circuit has firmly held that witness statements are protectible under Exemption 5.[170] Despite the weight of law that supports the proposition that the contours of Exemption 5 are coextensive with the protections of the work-product privilege, though, some courts have held that witness statements are not protectible, either on the theory that they fail to meet Exemption 5's threshold requirement,[171] or that the witness statements are merely unprivileged factual information which must be segregated for disclosure.[172]

Any such differences over the traditional protection accorded witness statements do not in any event affect the viability of protecting aircraft accident witness statements. Such statements are protected under a distinct common law privilege first enunciated in Machin v. Zuckert[173] and applied under the FOIA in Weber Aircraft.[174] (See discussion of Other Privileges, below.)

As a final point, it should be noted that the Supreme Court's decision in Grolier resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as

---

[169] See Hickman v. Taylor, 329 U.S. at 511.

[170] See Martin v. Office of Special Counsel, 819 F.2d at 1187.

[171] See Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988) (witness statements taken from nonagency employees held not "intra-agency"); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (Exemption 5 narrowly construed so as to apply only to "internal agency documents or documents prepared by outsiders who have a formal relationship with the agency"); Poss v. NLRB, 565 F.2d 654, 659 (10th Cir. 1977) (same); Kilroy v. NLRB, 633 F. Supp. 136, 142 (S.D. Ohio 1985) (rejecting application of Weber Aircraft to witness statements), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite).

[172] See, e.g., Uribe v. Executive Office for United States Attorneys, slip op. at 6 (statements made by plaintiff during interrogation did not "represent the attorney's conclusions, recommendations and opinions"); Wayland v. NLRB, 627 F. Supp. 1473, 1476 (M.D. Tenn. 1986) (witness statements not shown to be other than objective reporting of facts and "thus do not reflect the attorney's theory of the case and his litigation strategy"). But see FOIA Update, Summer 1987, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements").

[173] 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

[174] See 465 U.S. at 799; see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) ("[T]he disclosure of 'factual' information that may have been volunteered would defeat the policy on which the Machin privilege is based.").

attorney work-product.[175] Thus, there exists no temporal limitation on work-product protection under the FOIA, as a matter of law.[176] Consequently, this is an area of exemption applicability in which there exists much opportunity for the exercise of sound administrative discretion on a case-by-case basis to disclose technically exempt information.[177] (See discussion of such discretionary disclosure in Discretionary Disclosure and Waiver, below.)

## Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[178] Unlike with the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those facts,[179] as well as communications between attorneys which reflect client-supplied information.[180]

The Supreme Court, in the civil discovery context, has emphasized the policy underlying the attorney-client privilege--"that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[181] As is set out in greater detail in the attorney work-product discussion above, the Supreme Court held in United States v. Weber Aircraft Corp.[182] and in FTC v. Grolier Inc.[183] that

---

[175] See 462 U.S. at 28; cf. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 798 F.2d 499, 502-03 (D.C. Cir. 1986) (en banc) (same result under Government in the Sunshine Act).

[176] See FOIA Update, Summer 1983, at 1-2.

[177] See, e.g., FOIA Update, Summer 1985, at 5 (suggesting consideration be given to discretionary disclosure of work-product information).

[178] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

[179] See, e.g., Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); NBC v. SBA, No. 92-6483, slip op. at 7 (S.D.N.Y. Jan. 28, 1993) (privilege protects "professional advice given by attorney that discloses" information given by client).

[180] See, e.g., Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (table cite).

[181] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see FOIA Update, Spring 1985, at 3-4.

[182] 465 U.S. 792, 799-800 (1984).

[183] 462 U.S. 19, 26-28 (1983).

the scopes of the various privileges are coextensive in the FOIA and civil discovery contexts. Thus, those decisions that expand or contract the privilege's contours according to whether it is presented in a civil discovery or a FOIA context[184] do not accurately reflect the law.[185]

The parallelism of a civil discovery privilege and Exemption 5 protection is particularly significant with respect to the concept of a "confidential communication" within the attorney-client relationship. To this end, one court has held that confidentiality may be inferred when the communications suggest that "'the government is dealing with its attorneys as would any private party seeking advice to protect personal interests.'"[186] In Upjohn Co. v. United States, the Supreme Court held that the privilege protects attorney-client communications where the specifics of the communication are confidential, even though the underlying subject matter is known to third parties.[187] Accordingly, the line of FOIA decisions that squarely conflicts with the Upjohn analysis[188] should not be followed.[189]

Finally, the Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-echelon employees as well.[190] This broad construction of the attorney-client privilege acknowledges the reality that such lower-echelon personnel often possess information relevant to an attorney's advice-rendering function.[191]

---

[184] See, e.g., Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 255 & n.28.

[185] See FOIA Update, Spring 1985, at 3-4.

[186] Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, slip op. at 4 (D.D.C. Feb. 21, 1986) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)). But see Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (confidentiality must be shown in order to invoke Exemption 5).

[187] See 449 U.S. at 395-96; see also United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388-90 (D.D.C. 1978).

[188] See, e.g., Schlefer v. United States, 702 F.2d at 245; Brinton v. Department of State, 636 F.2d at 604; Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 255.

[189] See FOIA Update, Spring 1985, at 4.

[190] See 449 U.S. at 392-97.

[191] See id.; see also Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (circulation within agency to employees involved in matter for which advice sought does not breach confidentiality); LSB Indus. v. Commissioner, (continued...)

## Other Privileges

The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.[192] However, the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.[193] Because Rule 501 of the Federal Rules of Evidence provides for courts to create privileges as necessary,[194] there exists the strong potential for "new" privileges to be applied under Exemption 5. However, one caveat should be noted in the application of discovery privileges under the FOIA: A privilege should not be used against a requester who would routinely receive such information in civil discovery.[195]

The Supreme Court in Federal Open Market Committee v. Merrill[196] found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.[197] The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by en-

---

[191](...continued)
556 F. Supp. 40, 43 (W.D. Okla. 1982) (agency investigators reporting information used by agency attorneys).

[192] See Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977); see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("To decide [whether a recognized privilege should be abandoned] in a FOIA case would be inappropriate, as Exemption 5 requires the application of existing rules regarding discovery, not their reformulation.").

[193] See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983). But see Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1519 (N.D. Cal. 1984) (suggesting that greater access under criminal discovery could affect whether disclosure required under FOIA).

[194] See Trammel v. United States, 445 U.S. 40, 47 (1980).

[195] See, e.g., United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988) (presentence report privilege, designed to protect report's subject, cannot be invoked against him as first-party requester); cf. Badhwar v. United States Dep't of the Air Force, 829 F.2d at 184 ("Exemption 5 requires application of existing rules regarding discovery, not their reformulation.").

[196] 443 U.S. 340 (1979).

[197] Id. at 360.

dangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."[198] Indeed, this harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.[199] Based upon this underlying theory, there is nothing to prevent Merrill from being read more expansively to protect the government from competitive disadvantage outside of the contract setting; indeed, the issue in Merrill was not presented strictly within such a setting.[200]

While the breadth of this privilege is not yet fully established, a realty appraisal generated by the government in the course of soliciting buyers for its property has been held to fall squarely within it,[201] as have an agency's background documents which it used to calculate its bid in a "contracting out" procedure,[202] as well as portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.[203] Quite clearly, however, purely legal memoranda drafted to assist contract award deliberations are not encompassed by this privilege.[204]

---

[198] Id. at 363.

[199] Taylor Woodrow Int'l, Ltd. v. United States, No. 88-429, slip op. at 5-7 (W.D. Wash. Apr. 6, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).

[200] See 443 U.S. at 360.

[201] See Government Land Bank v. GSA, 671 F.2d 663, 665-66 (1st Cir. 1982) ("FOIA should not be used to allow the government's customers to pick the taxpayers' pockets.").

[202] See Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

[203] See Hack v. Department of Energy, 538 F. Supp. 1098, 1100 (D.D.C. 1982); see generally Feldman, The Government's Commercial Data Privilege Under Exemption Five of the Freedom of Information Act, 105 Mil. L. Rev. 125 (1984); Belazis, The Government's Commercial Information Privilege: Technical Information and the FOIA's Exemption 5, 33 Admin. L. Rev. 415 (1981); see also FOIA Update, Fall 1983, at 14-15. But see also American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3-4 (D.D.C. July 22, 1983) (distinguishing Merrill).

[204] See Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1319-20 n.11 (5th Cir. 1980); see also News Group Boston, Inc. v. National R.R. Passengers Corp., 799 F. Supp. 1264, 1270 (D. Mass. 1992) (affidavits insufficient to show why Amtrack payroll information covered by privilege), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

More recently, the Supreme Court, in United States v. Weber Aircraft Corp.,[205] held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations. Broadening the holding of Merrill that a privilege "mentioned in the legislative history of Exemption 5 is incorporated by the exemption,"[206] the Court ruled in Weber Aircraft that this long-recognized civil discovery privilege, even though not specifically mentioned there, nevertheless falls within Exemption 5.[207] The "plain statutory language"[208] and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations[209] support this result.[210] This privilege has been applied also to protect statements made in Inspector General investigations.[211]

Similarly, in Hoover v. Department of the Interior, the Court of Appeals for the Fifth Circuit recognized an Exemption 5 privilege based on Federal Rule of Civil Procedure 26(b)(4), which limits the discovery of reports prepared by expert witnesses.[212] The document at issue in Hoover was an appraiser's report prepared in the course of condemnation proceedings.[213] In support of its conclusions, the Fifth Circuit stressed that such a report would not have been routinely discoverable and that premature release would jeopardize the bargaining position of the government.[214]

Because Exemption 5 incorporates virtually all civil discovery privileges, courts are increasingly recognizing the applicability of other privileges, whether

---

[205] 465 U.S. at 799.

[206] Id. at 800.

[207] See also FOIA Update, Spring 1984, at 12-13.

[208] 465 U.S. at 802.

[209] Id.

[210] See also Badhwar v. United States Dep't of the Air Force, 829 F.2d at 185 (privilege applied to contractor report).

[211] See Ahearn v. United States Army Materials & Mechanics Research Ctr., 583 F. Supp. 1123, 1124 (D. Mass. 1984); see also Walsh v. Department of the Navy, No. 91-C-7410, slip op. at 10-11 (N.D. Ill. Mar. 23, 1992); American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308, 1313 (D.D.C. 1977). But see also Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602, 606-07 (D.D.C. 1985) (finding privilege inapplicable where report format provided anonymity to witnesses).

[212] See 611 F.2d 1132, 1141 (5th Cir. 1980).

[213] See id. at 1135.

[214] See id. at 1142; cf. Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118-19 (D.D.C. 1984) (Rule 26(b)(4) provides parallel protection in civil discovery for opinions of expert witnesses who will not testify at trial).

traditional or new, in the FOIA context. Among those other privileges now recognized for purposes of the FOIA are the confidential report privilege,[215] the presentence report privilege,[216] the critical self-evaluative privilege,[217] and the settlement negotiations privilege.[218] (For a detailed discussion of the settlement negotiations privilege, see Initial Considerations, above.)

Lastly, while it is evident that courts will continue to apply such civil discovery privileges under Exemption 5 of the FOIA, the mere fact that a particular privilege has been recognized by state law will not necessarily mean that it will be recognized by a federal court.[219]

## EXEMPTION 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C). While the application of Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."[1] Of course, these exemptions cannot be invoked to withhold from a requester information pertaining only to himself.[2]

### Initial Considerations

To warrant protection under Exemption 6, information must first meet its threshold requirement; in other words, it must fall within the category of "per-

---

[215] Cf. Washington Post Co. v. HHS, 603 F. Supp. 235, 238-39 (D.D.C. 1985) ("confidential report" privilege applied under Exemption 4), rev'd on other grounds, 795 F.2d 205 (D.C. Cir. 1986).

[216] See United States Dep't of Justice v. Julian, 486 U.S. at 9 (recognizing privilege, but finding it applicable to third-party requesters only).

[217] Cf. Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 18-21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987) (privilege applied under Exemption 4), rev'd & remanded on other grounds, 863 F.2d 96 (D.C. Cir. 1988).

[218] Cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (privilege applied under Exemption 4 but not under Exemption 5).

[219] See, e.g., Sneirson v. Chemical Bank, 108 F.R.D. 159, 162 (D. Del. 1985) (non-FOIA case); Cincotta v. City of N.Y., No. 83-7506, slip op. at 3-4 (S.D.N.Y. Nov. 14, 1984) (non-FOIA case).

[1] 5 U.S.C. § 552(b)(6) (1988).

[2] See H.R. Rep. No. 1380, 93d Cong., 2d Sess. 13 (1974); see also FOIA Update, Spring 1989, at 5.

sonnel and medical files and similar files."[3] Personnel and medical files are easily identified. However, there has not always been complete agreement about the meaning of the term "similar files." Prior to 1982, judicial interpretations of that phrase varied considerably and included a troublesome line of cases in the Court of Appeals for the District of Columbia Circuit, commencing with Board of Trade v. Commodity Futures Trading Commission,[4] which narrowly construed the term to encompass only "intimate" personal details.

In 1982, the Supreme Court acted decisively to resolve this controversy. In United States Department of State v. Washington Post Co.,[5] it firmly held, based upon a review of the legislative history of the FOIA, that Congress intended the term to be interpreted broadly, rather than narrowly.[6] The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."[7] Rather, the Court made clear that all information which "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.[8]

The D.C. Circuit, sitting en banc, subsequently reinforced the Supreme Court's broad interpretation of this term by holding that a tape recording of the last words of the space shuttle Challenger crew, which "reveal[ed] the sound and inflection of the crew's voices during the last seconds of their lives . . . contains personal information the release of which is subject to the balancing of the public gain against the private harm at which it is purchased."[9] Not only did the D.C. Circuit determine that "lexical" and "non-lexical" information are

---

[3] 5 U.S.C. § 552(b)(6).

[4] 627 F.2d 392, 400 (D.C. Cir. 1980).

[5] 456 U.S. 595 (1982).

[6] See id. at 599-603 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964)).

[7] 456 U.S. at 601 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

[8] 456 U.S. at 602. But see Providence Journal Co. v. United States Dep't of the Army, 781 F. Supp. 878, 883 (D.R.I. 1991) (investigative report of criminal charges not "similar file" because "created in response to specific criminal allegations" rather than "regularly compiled administrative record"), rev'd in part on other grounds, 981 F.2d 552 (1st Cir. 1992).

[9] New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc). But see also Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 14 (D.D.C. 1990) (information pertaining to employee's compliance with agency regulations regarding his appearance at public meeting at which he was identified as agency employee "does not go to personal information . . . [e]ven in view of the broad interpretation [of Exemption 6] enunciated by the Supreme Court").

subject to identical treatment under the FOIA,[10] it also concluded that Exemption 6 is equally applicable to the "author" and the "subject" of a file.[11]

It is also important to note that, in order to qualify for protection under Exemption 6, information must be identifiable to a specific individual. Information pertaining to a large group of individuals is not identifiable to any specific individual, unless that bit of information is attributable to members of the group as a whole.[12] Likewise, information pertaining to a single individual whose identity cannot be determined after deletion of his name from the records does not qualify for Exemption 6 protection.[13]

Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy.[14] First, it must be ascertained whether a protectible privacy interest exists which would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary, and the information at issue must be disclosed.[15]

---

[10] 920 F.2d at 1005.

[11] Id. at 1007-08.

[12] See, e.g., Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (list of drugs ordered for use by some members of group of over 600 individuals).

[13] Citizens for Envtl. Quality v. United States Dep't of Agric., 602 F. Supp. 534, 538-39 (D.D.C. 1984) (health test results ordered disclosed because identity of only agency employee tested could not, after deletion of his name, be ascertained from information known outside agency) (citing Department of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976) (dicta)); see also Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 23 (D.D.C. Aug. 24, 1993) (information about inmate's cooperation ordered released after redacting name and identifying details); Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9 (W.D. Mo. Dec. 14, 1989) (urinalysis reports of air traffic controllers ordered disclosed with names and dates redacted to conceal identities); cf. United States Dep't of State v. Ray, 112 S. Ct. 541, 548 (1991) ("Although disclosure of [highly] personal information constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when personal information is linked to particular interviewees.").

[14] Rose, 425 U.S. at 372; Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

[15] Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Holland v. CIA, No. 91-1233, slip op. at 32 (D.D.C. Aug. 31, 1992) (information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis).

On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure.[16] If no public interest exists, the information should be protected; as the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time."[17] Similarly, if the privacy interest outweighs the public interest, the information should be withheld; if the opposite is found to be the case, the information should be released.[18]

## The Reporters Committee Decision

In 1989, the Supreme Court issued a landmark FOIA decision in United States Department of Justice v. Reporters Committee for Freedom of the Press,[19] which greatly affects all privacy-protection decisionmaking under the Act. The Reporters Committee case involved FOIA requests from members of the news media for access to any criminal history records--known as "rap sheets"--maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt Congressman.[20] In holding "rap sheets" entitled to protection under Exemption (7)(C), the Supreme Court set forth five guiding principles that now govern the process by which determinations are made under both Exemptions 6 and 7(C) alike:

First, the Supreme Court made clear in Reporters Committee that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time. Establishing a "practical obscurity" standard,[21] the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them.[22]

Second, the Court articulated the rule that the identity of a FOIA requester cannot be taken into consideration in determining what should be released under the Act. With the single exception that of course an agency will not invoke an exemption where the particular interest to be protected is the request-

---

[16] Ripskis, 746 F.2d at 3.

[17] National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990); see also International Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (no public interest in disclosure of employees' social security numbers).

[18] See FOIA Update, Spring 1989, at 7 (outlining mechanics of balancing process).

[19] 489 U.S. 749 (1989); see also FOIA Update, Spring 1989, at 3-6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

[20] 489 U.S. at 757.

[21] Id. at 762, 780.

[22] Id. at 764.

er's own interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request."[23]

Third, the Court declared that in determining whether any public interest would be served by a requested disclosure, one should no longer consider "the purposes for which the request for information is made."[24] Rather than turn on a requester's "particular purpose," circumstances, or proposed use, the Court ruled, such determinations "must turn on the nature of the requested document and its relationship to" the public interest generally.[25]

Fourth, the Court sharply narrowed the scope of the public interest to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA."[26] This "core purpose of the FOIA," as the Court termed it,[27] is to "shed[] light on an agency's performance of its statutory duties."[28]

Fifth, the Court established the proposition, under Exemption 7(C), that agencies may engage in "categorical balancing" in favor of nondisclosure.[29] Under this approach, which builds upon the above principles, it may be determined, "as a categorical matter," that a certain type of information always is protectible under an exemption, "without regard to individual circumstances."[30]

## Privacy Considerations

The first step in the Exemption 6 balancing process requires an assessment of the privacy interests at issue.[31] The relevant inquiry is whether public access to the information at issue would violate a viable privacy interest of the

---

[23] Id. at 771.

[24] Id.

[25] Id. at 772.

[26] Id. at 774.

[27] Id. at 775.

[28] Id. at 773.

[29] Id. at 776-80 & n.22.

[30] Id. at 780; see, e.g., Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) ("Exemption 6 protects 'Excelsior' lists [names and addresses of employees eligible to vote in union representation elections] as a category"), cert. denied, 112 S. Ct. 912 (1992); Grove v. Department of Justice, 802 F. Supp. 506, 511 (D.D.C. 1992) (Categorical balancing is appropriate for "information concerning criminal investigations of private citizens.") (Exemption 7(C)).

[31] See FOIA Update, Spring 1989, at 7.

subject of such information.[32] In its Reporters Committee decision, the Supreme Court stressed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."[33] Thus, in Reporters Committee, the Court found a "strong privacy interest" in the nondisclosure of records of a private citizen's criminal history, "even where the information may have been at one time public."[34] Of course, information need not be intimate or embarrassing to qualify for Exemption 6 protection.[35]

As a general rule, the threat to privacy must be real rather than speculative.[36] In some cases, this principle formerly was interpreted to mean that the privacy interest must be threatened by the very disclosure of information and not by any possible "secondary effects" of such release.[37] The material itself had to contain information which itself would cause an invasion of an individual's privacy, because, it was said, "Exemption 6 does not take into account unsubstantiated speculation about possible secondary side effects that may follow release."[38] One such "secondary effect" previously held not to be cognizable under Exemption 6 was the "receipt of unsolicited commercial mailings" upon disclosure of names and office addresses of stateside military personnel.[39]

The Court of Appeals for the District of Columbia Circuit, however, has pointedly clarified its holding in Arieff v. United States Department of the Navy,[40] which had been read as stating that "secondary effects" were not cognizable under Exemption 6. In National Association of Retired Federal Employees v. Horner [hereinafter NARFE], the D.C. Circuit has explained that the

---

[32] See Schell v. HHS, 843 F.2d 933, 938 (6th Cir. 1988); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984).

[33] 489 U.S. 749, 763 (1989).

[34] Id. at 767; see also FOIA Update, Spring 1989, at 4.

[35] United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

[36] Department of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976); Carter v. United States Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987); Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983).

[37] See, e.g., Southern Utah Wilderness Alliance, Inc. v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988), vacated as moot, No. 88-5142 (D.C. Cir. Nov. 15, 1988).

[38] Id. at 39.

[39] Hopkins v. Department of the Navy, No. 84-1868, slip op. at 5 (D.D.C. Feb. 5, 1985).

[40] 712 F.2d at 1468.

point in Arieff was that Exemption 6 was inapplicable because there was only "mere speculation" of a privacy invasion, i.e., only a slight possibility that the information, if disclosed, would be linked to a specific individual.[41] On the other hand, it has now explicitly been recognized that "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."[42] Even prior to that clarification, one court pragmatically observed that to distinguish between the initial disclosure and unwanted intrusions as a result of that disclosure would be "to honor form over substance."[43] Now, with the D.C. Circuit's clarification in NARFE of this troubling point, there should no longer be any such concern over "secondary effects" under Exemption 6.

In some instances, the disclosure of information may involve little or no invasion of privacy because no expectation of privacy exists. For example, if the information at issue is particularly well known or is widely available within the public domain, there generally is no such expectation of privacy.[44] At the same time, if the information in question was at some time or place available to the public, but is now "hard-to-obtain information," the individual to whom it pertains may have a privacy interest in maintaining its "practical obscurity."[45]

As another example, FOIA requesters, except when they are making first-party requests, do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test.[46] Personal information about

---

[41] 879 F.2d at 878.

[42] Id.; see, e.g., Hougan & Denton v. United States Dep't of Justice, No. 90-1312, slip op. at 3 (D.D.C. July 3, 1991) (solicitation by employers would invade privacy of participants in local union's training program). But see also United States Dep't of State v. Ray, 112 S. Ct. 541, 550-51 (1991) (Scalia, J., concurring in part).

[43] Hudson v. Department of the Army, No. 86-1114, slip op. at 6 (D.D.C. Jan. 29, 1987) (protecting personal information on basis that disclosure could ultimately lead to physical harm), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (table cite); see also, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985) (same).

[44] See, e.g., National W. Life Ins. Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (names and duty stations of Postal Service employees); see also Core v. United States Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984) (no substantial invasion of privacy found in information identifying successful federal job applicants).

[45] Reporters Committee, 489 U.S. at 780; accord United States Dep't of State v. Washington Post Co., 456 U.S. at 603 n.5.

[46] See FOIA Update, Winter 1985, at 6; see also Holland v. CIA, No. 91-1233, slip op. at 30-32 (D.D.C. Aug. 31, 1992) (researcher who requested

(continued...)

requesters, however, such as home addresses and phone numbers, should not be disclosed.[47] In addition, the identities of first-party requesters under the Privacy Act of 1974[48] should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests.[49] Moreover, individuals who write to the government expressing personal opinions generally do so with some expectation of confidentiality; their identities, but not necessarily the substance of their letters, should be withheld accordingly.[50]

Additionally, neither corporations nor business associations possess protectible privacy interests.[51] The closely held corporation or similar business entity, however, is an exception to this principle: "While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical."[52]

The right to privacy of deceased persons is not entirely settled, but the

---

[46](...continued)
assistance of presidential advisor in obtaining CIA files he had requested held comparable to FOIA requester whose identity is not protected by Exemption 6); Martinez v. FBI, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (identities of news reporters seeking information concerning criminal investigation not protected) (Exemption 7(C)).

[47] See FOIA Update, Winter 1985, at 6.

[48] 5 U.S.C. § 552a (1988 & Supp. IV 1992).

[49] See FOIA Update, Winter 1985, at 6.

[50] See Wilson v. Department of Justice, No. 87-2415, slip op. at 13 (D.D.C. June 14, 1991); see also Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564 (D.C. Cir. 1982) (Mackinnon, J., concurring). But see also Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 5 (N.D. Cal. Mar. 27, 1985) (ordering disclosure of names of private citizens who wrote to Members of Congress and to Attorney General expressing views on McCarthy-era prosecution).

[51] See, e.g., Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1567 (D.D.C. 1985).

[52] Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980); see also National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 685-86; FOIA Update, Sept. 1982, at 5. But see Ackerson & Bishop Chartered v. United States Dep't of Agric., No. 92-1068, slip op. at 1 (D.D.C. July 15, 1992) (commercial mushroom growers operating under personal names have no expectation of privacy).

majority rule is that death extinguishes their privacy rights.[53] The Department of Justice follows this rule as a matter of policy.[54] However, particularly sensitive, often graphic, personal details about the circumstances surrounding an individual's death may be withheld where necessary to protect the privacy interests of surviving family members.[55] Even information that is not particularly sensitive in itself may be withheld to protect the privacy of surviving family members if release of the information would cause "a disruption of their

---

[53] See, e.g., Tigar & Buffone v. United States Dep't of Justice, No. 80-2382, slip op. at 9-10 (D.D.C. Sept. 30, 1983) (Exemption 7(C)); Diamond v. FBI, 532 F. Supp. 216, 227 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Rabbitt v. Department of the Air Force, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), on motion for reconsideration, 401 F. Supp. 1206, 1210 (S.D.N.Y. 1975); cf. United States v. Schlette, 842 F.2d 1574, 1581 (9th Cir.) (disclosure of presentence report of deceased person pursuant to Rule 32(c) of Federal Rules of Criminal Procedure), amended, 854 F.2d 359 (9th Cir. 1988). But see Kiraly v. FBI, 728 F.2d 273, 277-78 (6th Cir. 1984) (Exemption 7(C)).

[54] See FOIA Update, Sept. 1982, at 5.

[55] See Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) ("no public interest in photographs of the deceased victim, let alone one that would outweigh the personal privacy interests of the victim's family") (Exemption 7(C)), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (affirming nondisclosure of autopsy reports of individuals killed by cyanide-contaminated products); Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports might "shock the sensibilities of surviving kin"); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records exempt because their release "would almost certainly cause . . . parents more anguish"); KTVY-TV v. United States, No. 87-1432-T, slip op. at 9 (W.D. Okla. May 4, 1989) ("The privacy rights asserted--those of the survivors and family of the victims in not having photographs of the bodies of the victims and clinical descriptions of their wounds being divulged--are patent and compelling and within the protections of the Act.") (Exemption 7(C)), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990); Crooker v. Federal Bureau of Prisons, No. 86-510, slip op. at 5 (D.D.C. Feb. 27, 1987) (release of "painful and graphic details" of murder of corrections officer "would cause great pain to the deceased's surviving family"); Price v. United States Dep't of Justice, No. 84-330A, slip op. at 5-8 (M.D. La. June 24, 1985) (protecting highly detailed medical and psychiatric data concerning inmate who died in federal facility). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure in absence of evidence of existence of survivors who would be offended by release of murder-scene photographs of man murdered 25 years earlier ); Journal-Gazette Co. v. United States Dep't of the Army, No. F89-147, slip op. at 8-9 (N.D. Ind. Jan. 8, 1990) (because autopsy report of Air National Guard pilot killed in training exercise contained "concise medical descriptions of the cause of death," not "graphic, morbid descriptions," survivors' minimal privacy interest outweighed by public interest).

peace of minds."[56]

Public figures do not surrender all rights to privacy by placing themselves in the public eye, though their expectations of privacy certainly may be diminished. In some instances, "[t]he degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure."[57] It has been held that disclosure of sensitive personal information contained in investigative records about a public figure is appropriate "only where exceptional interests militate in favor of disclosure."[58] Thus, although one's status as a public figure might in some circumstances tip the balance in favor of disclosure, a public figure does not, by virtue of his status, forfeit all rights of privacy.[59] It also should be noted that, unlike under the Privacy Act, foreign nationals are entitled to the same privacy rights under the FOIA as are U.S. citizens.[60]

In addition, individuals who testify at criminal trials do not forfeit their rights to privacy except on those very matters that become part of the public record.[61] Similarly, individuals who provide law enforcement agencies with reports of illegal conduct have well-recognized privacy interests, particularly

---

[56] New York Times Co. v. NASA, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (withholding audiotape of voices of Challenger astronauts recorded immediately before their deaths, to protect family members from pain of hearing final words of loved ones); see also FOIA Update, Sept. 1982, at 5.

[57] Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 865 (D.C. Cir. 1981) (Exemption 7(C)).

[58] Id. at 866; see also Wilson v. Department of Justice, No. 87-2415, slip op. at 13 (D.D.C. June 14, 1991) (even Richard Secord would have privacy interest in fact that he was investigated; such investigation would reveal "little about 'what government is up to'"). But see also Wilson v. Department of Justice, 87-2415, slip op. at 8 (D.D.C. June 17, 1991) (ordering further declarations to determine whether any of the individuals investigated "are 'public figures' like the plaintiff whose involvement in Government operations would be of interest to the public").

[59] Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d at 865; see also FOIA Update, Sept. 1982, at 5; cf. Strassman v. United States Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (Exemption 7(C)).

[60] Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1067 (D.D.C. 1983); see, e.g., United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (applying traditional analysis of privacy interests under FOIA to Haitian nationals); see also FOIA Update, Summer 1985, at 5.

[61] See Kiraly v. FBI, 728 F.2d at 279; Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); cf. Irons v. FBI, 880 F.2d 1446, 1454 (1st Cir. 1989) (en banc) (holding that disclosure of any source information beyond that actually testified to by confidential source is not required) (Exemption 7(D)).

when such persons reasonably fear reprisals for their assistance.[62] (For a more detailed discussion of the privacy protection accorded such law enforcement sources, see discussion of Exemption 7(C), below.) Even absent any evidence of fear of reprisals, however, witnesses who provide information to investigative bodies--administrative and civil, as well as criminal--are generally accorded privacy protection.[63]

An agency generally is not required to conduct research to determine whether an individual has died or whether his activities have sufficiently become the subject of public knowledge so as to bar the application of Exemption 6.[64] This is further strengthened by the Supreme Court's observations in Reporters Committee that "without regard to individual circumstances" certain categories of records will always warrant privacy protection and that "the standard virtues of bright-line rules are thus present, and the difficulties attendant to

---

[62] See Holy Spirit Ass'n v. FBI, 683 F.2d at 564-65 (concurring opinion) (Exemptions 6 and 7(C)); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 809 (D.N.J. 1993) (Because the La Cosa Nostra "is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law enforcement personnel must be safeguarded.") (Exemption 7(C)).

[63] See, e.g., Walsh v. Department of the Navy, No. 91-C-7410, slip op. at 11 (N.D. Ill. Mar. 23, 1992); Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 7-8 (D.N.M. June 23, 1991). But cf. Fine v. United States Dep't of Energy, 823 F. Supp. 888, 896 (D.N.M. 1993) (ordering disclosure based, in part, upon fact that plaintiff no longer employed by agency and "not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors").

[64] See FOIA Update, Winter 1984, at 5; see also, e.g., Williams v. United States Dep't of Justice, 556 F. Supp. 63, 66 (D.D.C. 1982) (agency good-faith processing, rather than extensive research for public disclosures, sufficient in lengthy, multi-faceted judicial proceedings); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case). But see also Diamond v. FBI, 707 F.2d at 77 (requiring agency to review 200,000 pages outside scope of request to search for evidence as to whether subjects' privacy had been waived through death or prior public disclosure) (Exemption 7(C)); Outlaw v. United States Dep't of Justice, 815 F. Supp. at 506 (photographs of victim murdered 25 years ago not withholdable to protect privacy of relatives where "[d]efendant's concern for the privacy of the decedent's surviving relatives has not extended to an effort to locate them . . . [and] there is no showing by defendant that, as of now, there are any surviving relatives of the deceased, or if there are, that they would be offended by the disclosure"); Wilkinson v. FBI, No. 80-1048, slip op. at 12-13 (C.D. Cal. June 17, 1987) (holding Exemption 7(C) inapplicable to documents more than 30 years old because government relied on presumption that "all persons the subject of FOIA requests are . . . living"); Powell v. United States Dep't of Justice, slip op. at 12-13 (requiring agency to determine present "specific life situations" of individuals who were referenced in 30-year-old treason/sedition investigation) (Exemption 7(C)).

ad hoc adjudication may be avoided."[65]

Likewise, it has been held that the FOIA does not require an agency "to track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request."[66] However, several pre-Reporters Committee cases held that the fact that a requester has not submitted authorizations from third parties may not in and of itself justify the automatic withholding of all information regarding those third parties on privacy grounds.[67]

Factoring in the Public Interest

Once it has been determined that a personal privacy interest is threatened by a requested disclosure, the second step in the balancing process comes into play; this stage of the analysis requires an assessment of the public interest in disclosure.[68] The burden of establishing that disclosure would serve the public interest is on the requester.[69] In its Reporters Committee decision, the Supreme Court has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "shed[] light on an agency's performance of its statutory duties."[70] Information that does not directly reveal the operations or activities of the federal government,[71] the Supreme

---

[65] 489 U.S. at 780; accord Halloran v. VA, 874 F.2d 315, 322 (5th Cir. 1989); see also FOIA Update, Spring 1989, at 4.

[66] Blakey v. Department of Justice, 549 F. Supp. 362, 365 (D.D.C. 1982) (Exemption 7(C)), aff'd in part, vacated in part, 720 F.2d 215 (D.C. Cir. 1983). But cf. War Babes v. Wilson, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (allowing agency 60 days to meet burden of establishing privacy interest by obtaining affidavits from World War II servicemen who object to release of their addresses to British citizens seeking to locate their natural fathers).

[67] See Ray v. United States Dep't of Justice, No. 86-5972, slip op. at 1 (6th Cir. June 22, 1987) (Exemption 7(C) "is not absolute simply because the person implicated in the sought-after documents refuses to consent to their disclosure."); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 15 (D.D.C. Dec. 3, 1985) (failure of plaintiff to submit authorization does not alone justify withholding; burden is on government to establish information is within Exemption 7(C)).

[68] See FOIA Update, Spring 1989, at 7.

[69] See Carter v. United States Dep't of Commerce, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987).

[70] 489 U.S. 749, 773 (1989).

[71] See Landano v. United States Dep't of Justice, 956 F.2d 422, 430 (3d Cir.) (There is "no FOIA-recognized public interest in discovering wrongdoing by a state agency.") (Exemption 7(C)), cert. denied, 113 S. Ct. 197 (1992); see also FOIA Update, Spring 1991, at 6 (advising that "government" should mean federal government).

Court has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve."[72] If an asserted public interest is found to qualify under this narrowed standard, it then must be accorded some measure of value so that it can be weighed against the threat to privacy.[73]

Even prior to Reporters Committee the law was clear that disclosure must benefit the public overall and not just the requester himself. For example, a number of courts determined that a request made for purely commercial purposes does not further a public interest.[74] Likewise, a request made in order to obtain or supplement discovery in a private lawsuit does not thereby further a public interest.[75] In fact, one court has observed that if the requester truly had a great need for the records for purposes of litigation, he or she should seek

---

[72] 489 U.S. at 775; see, e.g., Gallant v. NLRB, No. 92-873, slip op. at 8-10 (D.D.C. Nov. 6, 1992) (disclosure of names of individuals to whom NLRB member sent letters in attempt to secure reappointment would not add to understanding of NLRB's performance of its duties) (appeal pending); Andrews v. United States Dep't of Justice, 769 F. Supp. 314, 316-17 (E.D. Mo. 1991) (although release of individual's address, telephone number and place of employment might serve general public interest in satisfaction of monetary judgments, "the nature of the public interest inquiry under the FOIA . . . turns on the relationship of the information to the basic purpose of the FOIA, which is 'to open agency action to the light of public scrutiny'" (quoting Reporters Committee, 489 U.S. at 772, quoting, in turn, Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976))); see also FOIA Update, Spring 1989, at 4, 6.

[73] See, e.g., Rose, 425 U.S. at 372; Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1981); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

[74] See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1413 (9th Cir. 1987) (commercial solicitation of Medicare recipients); Minnis v. United States Dep't of Agric., 737 F.2d 784, 786-87 (9th Cir. 1984) (applicants for rafting permits requested by commercial establishment located on river), cert. denied, 471 U.S. 1053 (1985); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (individuals licensed to produce wine at home requested by distributor of amateur wine-making equipment); see also Aronson v. HUD, 822 F.2d 182, 185-86 (1st Cir. 1987) (Plaintiff's "commercial motivations are irrelevant for determining the public interest served by disclosure; they do, however, suggest one of the ways in which private interests could be harmed by disclosure and a reason why individuals would wish to keep the information confidential.")

[75] See FOIA Update, Sept. 1982, at 6 (citing, e.g., Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 487 (M.D. Fla. 1981)); see also Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (private litigation); Harry v. Department of the Army, No. 92-1654, slip op. at 7-8 (D.D.C. Sept. 10, 1993) (to appeal negative officer efficiency report); National Treasury Employees Union v. United States Dep't of the Treasury, 3 Gov't Disclosure Serv. (P-H) ¶ 83,224, at 83,948 (D.D.C. June 17, 1983) (grievance proceeding).

them in that forum, where it would be possible to provide them under an appropriate protective order.[76] The Court of Appeals for the Ninth Circuit alone had adopted a position which specifically factored into the balancing process the requester's personal interest in disclosure.[77]

In Reporters Committee, the Supreme Court clearly approved the majority view that the requester's personal interest is irrelevant. First, as the Court emphasized, the requester's identity can have "no bearing on the merits of his or her FOIA request."[78] In so declaring, the Court ruled unequivocally that agencies should treat all requesters alike in making FOIA disclosure decisions; the only exception to this, the Court specifically noted, is that of course an agency should not withhold from a requester any information that implicates only that requester's own interest.[79] Furthermore, the "public interest" balancing required under the privacy exemptions should not include consideration of the requester's "particular purpose" in making the request.[80] Instead, the Court has instructed, the proper approach to the balancing process is to focus on "the nature of the requested document" and to consider "its relationship to" the public interest generally.[81] This approach thus does not permit attention to the special circumstances of any particular FOIA requester.[82] Rather, it necessarily involves a more general "public interest" assessment based upon the contents and context of the records sought and their connection to any "public interest" that would be served by disclosure. In making such assessments, agencies should look to the possible effects of disclosure to the public in general.

One purpose that the FOIA was designed for is to "check against corrup-

---

[76] Gilbey v. Department of the Interior, No. 89-801, slip op. at 4-5 (D.D.C. Oct. 22, 1990).

[77] See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1413; Minnis v. United States Dep't of Agric., 737 F.2d at 786; Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979).

[78] 489 U.S. at 771; see also FOIA Update, Spring 1989, at 5-6.

[79] See 489 U.S. at 771; FOIA Update, Spring 1989, at 5; see also, e.g., Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9-10 (W.D. Mo. Dec. 14, 1989) (withholding names of third parties mentioned in plaintiffs' own statements).

[80] 489 U.S. at 772.

[81] Id.

[82] See id. at 771-72 & n.20.

tion and to hold the governors accountable to the governed."[83] Indeed, information which would inform the public of violations of the public trust has a strong public interest and is accorded great weight in the balancing process. As a general rule, proven wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh the privacy interest of the official.[84] By contrast, less serious misconduct by low-level agency employees generally is not considered of sufficient public interest to outweigh the privacy interest of the employee.[85] Nor is there likely to be

---

[83] Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1415 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)); see also Washington Post Co. v. HHS, 690 F.2d 252, 264 (D.C. Cir. 1982); Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487 (D.D.C. 1984).

[84] See, e.g., Cochran v. United States, 770 F.2d 949, 956-57 (11th Cir. 1985) (nonjudicial punishment findings and discipline imposed on Army major general for misuse of government funds and facilities) (Privacy Act "wrongful disclosure" suit); Stern v. FBI, 737 F.2d 84, 93-94 (D.C. Cir. 1984) (name of high-level FBI official censured for deliberate and knowing misrepresentation) (Exemption 7(C)); Columbia Packing Co. v. United States Dep't of Agric., 563 F.2d 495, 499 (1st Cir. 1977) (federal employees found guilty of accepting bribes); Sullivan v. VA, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (reprimand of senior official for misuse of government vehicle and failure to report accident) (Privacy Act "wrongful disclosure" suit/Exemption 7(C)); Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers); cf. Castaneda v. United States, 757 F.2d 1010, 1012 (9th Cir.) (identity of USDA investigator ordered disclosed where court found his reports "were inconsistent and may have been unreliable" and his motives and truthfulness were "in doubt") (Exemption 7(C)), amended upon denial of panel reh'g, 773 F.2d 251, 251 (9th Cir. 1985); Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (attempt to expose alleged deal between prosecutor and witness found to be in public interest) (Exemption 7(C)), vacated & reinstated in part on reh'g, 671 F.2d 769 (3d Cir. 1982); Stern v. SBA, 516 F. Supp. 145, 149 (D.D.C. 1980) (names of agency personnel charged with discriminatory violations).

[85] See, e.g., Department of the Air Force v. Rose, 425 U.S. at 381 (names of cadets found to have violated Academy honor code protected); Beck v. Department of Justice, 997 F.2d 1489, 1493 (D.C. Cir. 1993) ("The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct."); Stern v. FBI, 737 F.2d at 94 (protecting names of mid-level employees censured for negligence); Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir.) (names of disciplined IRS agents protected), cert. denied, 444 U.S. 842 (1979); Cotton v. Adams, 798 F. Supp. 22, 26-27 (D.D.C. 1992) (release of Inspector General reports on conduct of low-level Smithsonian Institution employees would not allow public to evaluate Institution's discharge of duties); Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) (pro-

(continued...)

strong public interest in the names of censured employees when the case has not "occurred against the backdrop of a well-publicized scandal" which has resulted in "widespread knowledge" that certain employees were disciplined.[86] And any general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations.[87]

Prior to Reporters Committee, some courts held that the public interest in disclosure may be embodied in other federal statutes.[88] In light of Reporters Committee and National Association of Retired Federal Employees v. Horner [hereinafter NARFE],[89] the D.C., First, Second, Sixth, Seventh, Tenth and Eleventh Circuit Courts of Appeals have flatly rejected this approach, refusing to order disclosure of the home addresses of government employees on the explicit basis that the public interest in disclosure evidenced in the Federal Service Labor-Management Relations Act cannot be factored into the balance under the

---

[85](...continued)
tecting names of agency personnel found to have committed "only minor, if any, wrongdoing") (Exemption 7(C)).

[86] Beck v. Department of Justice, 997 F.2d at 1493-94.

[87] See, e.g., Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (Exemption 7(C)); Dunkelberger v. Department of Justice, 906 F.2d 779, 781-82 (D.C. Cir. 1990) (Exemption 7(C)); Carter v. United States Dep't of Commerce, 830 F.2d at 391 (protecting identities of attorneys subject to disciplinary proceedings that were later dismissed); Varelli v. FBI, No. 88-1865, slip op. at 10-13 (D.D.C. Oct. 4, 1991). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 569 (1st Cir. 1992) (ordering disclosure of identities of high-ranking officers of Rhode Island National Guard accused of criminal wrongdoing even though allegations were mostly "unsubstantiated"); McCutchen v. HHS, No. 91-142, slip op. at 7-12 (D.D.C. Aug. 24, 1992) (refusing to protect identities of scientists found not to have engaged in alleged scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending); Dobronski v. FCC, No. 91-1295, slip op. at 3-4 (D. Ariz. June 16, 1992) (ordering release of employee's leave slips for period during which there were allegations of abuse of leave time) (appeal pending).

[88] See, e.g., International Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 90 (3d Cir. 1988) (wage rates payable by federal contractors regulated by Davis-Bacon Act); United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir.) (names and addresses of federal employees under federal labor relations statute), cert. granted & remanded, 488 U.S. 1025 (1988), vacated, 876 F.2d 50 (8th Cir. 1989); Common Cause v. National Archives & Records Serv., 628 F.2d 179, 183-85 (D.C. Cir. 1980) (political campaign activities under Federal Corrupt Practices Act) (Exemption 7(C)); Washington Post Co. v. HHS, 690 F.2d at 265 (public disclosure of financial statements required by Ethics in Government Act); see also Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (finding nondisclosure proper upon consideration of state statute mandating same).

[89] 879 F.2d 873 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

FOIA.[90] On the other hand, the Third, Fifth and Ninth Circuit Courts of Appeals have reached the opposite conclusion and have ordered disclosure of the home addresses of bargaining unit employees to unions that requested them under the FSLMRA.[91] These circuit courts said the Supreme Court had not considered specifically whether the public policy favoring collective bargaining embodied in the FSLMRA could be considered in balancing under the FOIA; consequently, none of these courts found an inconsistency between its holding and the teaching of Reporters Committee.[92] Because of this split in the circuits, the Supreme Court has granted certiorari in the Fifth Circuit case[93] and should finally resolve this issue during the coming year.

On a related issue, two district courts have departed from the direction taken by Reporters Committee with regard to another federal statute, the Davis-

---

[90] D.C. Circuit: FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1453 (D.C. Cir. 1989) (court not "entitled to engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process"), cert. denied, 493 U.S. 1056 (1990); First Circuit: FLRA v. United States Dep't of the Navy, 941 F.2d 49, 56-57 (1st Cir. 1991) (in balancing privacy and public interests under FOIA, court must disregard "public interest in labor organization and collective bargaining"); Second Circuit: FLRA v. VA, 958 F.2d 503, 511-12 (2d Cir. 1992) ("The public interest in fostering effective collective bargaining falls outside this central purpose of the FOIA."); Sixth Circuit: FLRA v. Department of the Navy, 963 F.2d 124, 125 (6th Cir. 1992) (adopting reasoning of First, Second and D.C. Circuits); Seventh Circuit: FLRA v. United States Dep't of the Navy, 975 F.2d 348, 354-55 (7th Cir. 1992) ("Neither [Privacy Act], nor FOIA, makes a further exception for information requests that originate under some other federal statute."); Tenth Circuit: FLRA v. DOD, 984 F.2d 370, 375 (10th Cir. 1993) ("disclosure of federal employees' home addresses has nothing to do with public scrutiny of government activities"); Eleventh Circuit: FLRA v. DOD, 977 F.2d 545, 548 (11th Cir. 1992) (finding "no authority for allowing Labor Statute principles to override FOIA principles"). See also Reed v. NLRB, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (disclosure of "Excelsior" list [names and addresses of employees eligible to vote in union representation elections] would not reveal anything about NLRB's operations), cert. denied, 112 S. Ct. 912 (1992).

[91] Third Circuit: FLRA v. United States Dep't of the Navy, 966 F.2d 747, 758-59 (3d Cir. 1992) (en banc) (alternative holding); Fifth Circuit: FLRA v. DOD, 975 F.2d 1106, 1113-15 (5th Cir.), cert. granted, 113 S. Ct. 1642 (1993); Ninth Circuit: FLRA v. United States Dep't of the Navy, 958 F.2d 1490, 1497 (9th Cir. 1992) (petition for rehearing en banc pending); see also FLRA v. Department of Commerce, 954 F.2d 994, 997 (4th Cir. 1992), vacated & petition for reh'g en banc granted, No. 90-1852 (4th Cir. Apr. 22, 1992).

[92] FLRA v. United States Dep't of the Navy, 966 F.2d at 757-59; FLRA v. United States Dep't of the Navy, 958 F.2d at 1496-97.

[93] 113 S. Ct. 1642 (1993).

Bacon Act,[94] which requires that contractors on federal projects pay to their laborers no less than the wages prevailing for comparable work in the geographical area. Three years ago, the District Court in Hawaii decided that the analyses comparing the public interest expressed in other federal statutes to that underlying the FOIA survive Reporters Committee and held that the public interest in monitoring compliance with the Davis-Bacon Act is cognizable under FOIA.[95] Subsequently, the District Court for the Western District of Washington agreed.[96] However, while both of these cases remain on appeal, the D.C. and Second Circuits, the first post-Reporters Committee courts of appeals to confront this issue, have firmly held that although there may be a minimal public interest in facilitating the monitoring of compliance with federal labor statutes, disclosure of personal information that reveals nothing "directly about the character of a government agency or official" bears only an "attenuated . . . relationship to governmental activity."[97] Accordingly, it has been held that such an "attenuated public interest in disclosure does not outweigh the construction workers' significant privacy interest in [their names and addresses]."[98]

Even though public oversight of government operations is the essence of public interest under the FOIA, one who claims such a purpose must support his claim by more than mere allegation. He must show that the information in question is "of sufficient importance to warrant such" oversight,[99] and he must show how the public interest would be served by disclosure in the particular case.[100] Assertions of "public interest" should be scrutinized carefully to ensure that they legitimately warrant the overriding of privacy interests. As stated by the Second Circuit in Hopkins v. HUD, "[t]he simple invocation of a legitimate public interest . . . cannot itself justify the release of personal information. Rather, a court must first ascertain whether that interest would be served

---

[94] 40 U.S.C. § 276a (1988).

[95] Painting Indus. of Hawaii Mkt. Recovery Fund v. United States Dep't of the Air Force, 751 F. Supp. 1410, 1417 (D. Haw. 1990), reconsideration denied, 756 F. Supp. 452 (D. Haw. 1990) (appeal pending).

[96] Seattle Bldg. & Constr. Trades Council, AFL-CIO v. HUD, No. C89-1346C, slip op. at 10-11 (W.D. Wash. Oct. 30, 1990) (appeal pending).

[97] Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); see Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991).

[98] Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d at 1303; see Hopkins v. HUD, 929 F.2d at 88.

[99] Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); see also Allard v. HHS, No. 4:90-CV-156, slip op. at 10-11 (W.D. Mich. Feb. 14, 1992) ("conclusory allegations" of plaintiff--a prisoner with violent tendencies--concerning ex-wife's misuse of children's Social Security benefits do not establish public interest), aff'd, 972 F.2d 346 (6th Cir. 1992) (table cite).

[100] See Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989).

by disclosure."[101] The Second Circuit in Hopkins acknowledged a legitimate public interest in monitoring HUD's enforcement of prevailing wage laws but found that disclosure of the names and addresses of workers employed on HUD-assisted public housing projects would shed no light on the agency's performance of that duty.[102] Thus, in Minnis v. United States Department of Agriculture, while the Ninth Circuit recognized a valid public interest in questioning the fairness of an agency lottery system which awarded permits to raft down the Rogue River, it found, upon careful analysis, that the release of the names and addresses of the applicants would in no way further that interest.[103] Similarly, in Heights Community Congress v. VA,[104] the Sixth Circuit found that the release of names and home addresses would result only in the "involuntary personal involvement" of innocent purchasers rather than appreciably furthering a concededly valid public interest in determining whether anyone had engaged in "racial steering."

Such holdings are entirely consistent with the Supreme Court's determination in Reporters Committee that the "rap sheet" of a defense contractor, if such existed, would reveal nothing directly about the behavior of the Congressman with whom the contractor allegedly had an improper relationship, nor would it reveal anything about the conduct of the DOD.[105] The information must

---

[101] 929 F.2d at 88 (citing Halloran v. VA, 874 F.2d at 323).

[102] Id.; see also Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., No. 90-1392, slip op. at 13-14 (D.D.C. Dec. 21, 1990) ("If in fact a student has defaulted, [his] name, address and social security number would reveal nothing about the Department's attempts to collect on those defaulted loans. Nor would [they] reveal anything about the potential misuse of public funds.").

[103] 737 F.2d at 787; see Hunt v. FBI, 972 F.2d at 289 (disclosure of single internal investigation file "will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common"); New York Times Co. v. NASA, 782 F. Supp. 628, 632-33 (D.D.C. 1991) (release of audiotape of Challenger astronauts' voices just prior to explosion would not serve "undeniable interest in learning about NASA's conduct before, during and after the Challenger disaster").

[104] 732 F.2d 526, 530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984).

[105] See 489 U.S. at 774; see also NARFE, 879 F.2d at 879 (names and home addresses of federal annuitants reveal nothing directly about workings of government); Halloran v. VA, 874 F.2d at 323 ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); Kimberlin v. Department of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("The record fails to reflect any benefit which would accrue to the public from disclosure and [the requester's] self-serving assertions of government wrongdoing and coverup do not rise to the level of justifying disclosure.") (Exemption 7(C)); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1519 (10th Cir. 1984) (finding that because allegations of improper use of law enforcement

(continued...)

clearly reveal official government activities; it is not enough that the information would permit speculative inferences about the conduct of an agency or a government official.[106] Nor is it enough that the information would allow a union to question private-sector employees and thus determine whether the agency is adequately monitoring compliance with prevailing wage laws,[107] or that the information might aid the requester in lobbying efforts that would result in passage of laws and thus benefit the public in that respect.[108]

The most significant recent development concerning this issue occurred in United States Department of State v. Ray,[109] when the Supreme Court recognized a legitimate public interest in whether the State Department was adequately monitoring Haiti's promise not to prosecute Haitians who were returned to their country after failed attempts to enter the United States, but it determined that this public interest had been "adequately served" by release of redacted summaries of the agency's interviews with the returnees and that "[t]he addition of the redacted identifying information would not shed any additional light on

---

[105](...continued)
authority were not at all supported in requested records, disclosure of FBI special agent names would not serve public interest) (Exemption 7(C)); Stern v. FBI, 737 F.2d at 92 (finding that certain specified public interests "would not be satiated in any way" by disclosure) (Exemption 7(C)); Miller v. Bell, 661 F.2d at 630 (noting that plaintiff's broad assertions of government cover-up were unfounded as investigation was of consequence to plaintiff only and therefore did not "warrant probe of FBI efficiency") (Exemption 7(C)); KTVY-TV v. United States, No. 87-1432-T, slip op. at 9-10 (W.D. Okla. May 4, 1989) ("The plaintiff has failed to establish any nexus between the information requested and the asserted public interest of determining whether the defendant has made an effort to prevent like occurrences.") (Exemption 7(C)), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990).

[106] See Reporters Committee, 489 U.S. at 774, 766 n.18; see also Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., slip op. at 12 (names, addresses and social security numbers of student loan defaulters would reveal nothing directly about Department of Education's administration of student loan program). But see International Diatomite Producers Ass'n v. United States Social Sec. Admin., No. C-92-1634, slip op. at 12-13 (N.D. Cal. Apr. 28, 1993) (release of vital status information concerning diatomite industry workers serves "public interest in evaluating whether public agencies (OSHA, MSHA, and EPA) carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure") (appeal pending).

[107] Hopkins v. HUD, 929 F.2d at 88.

[108] NARFE, 879 F.2d at 875; see also FOIA Update, Spring 1989, at 6. But cf. Aronson v. HUD, No. 88-1524, slip op. at 1 (1st Cir. Apr. 6, 1989) (affirming award of attorney fees on basis that disclosure of names and addresses of mortgagors to whom HUD owes money sheds light on HUD's performance of statutory reimbursement duty).

[109] 112 S. Ct. 541 (1991).

the Government's conduct of its obligation."[110] Although the plaintiff claimed that disclosure of the identities of the unsuccessful emigrants would allow him to reinterview them and elicit further information concerning their treatment, the Court found "nothing in the record to suggest that a second set of interviews with the already-interviewed returnees would produce any relevant information . . . . Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."[111]

Finally, if alternative, less intrusive means are available to obtain information that would serve the public interest, there is less need to require disclosure of information that would cause a substantial invasion of an individual's privacy. Accordingly, "[w]hile [this is] certainly not a per se defense to a FOIA request," it is entirely appropriate, when assessing the public interest side of the balancing equation, to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure."[112] If there are alternative sources, the D.C. Circuit has firmly ruled, the public interest in disclosure should be "discounted" accordingly.[113]

## The Balancing Process

Once both the privacy interest at stake and the public interest in disclosure have been ascertained, the two competing interests must be weighed

---

[110] Id. at 549; see also Public Citizen, Inc. v. Resolution Trust Corp., No. 92-0010, slip op. at 8-9 (D.D.C. Mar. 19, 1993) (public interest in agency's compliance with Affordable Housing Disposition Program served by release of information with identities of bidders and purchasers redacted).

[111] 112 S. Ct. at 549.

[112] DOD v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992); see FLRA v. United States Dep't of Commerce, 962 F.2d 1055, 1060 n.2 (D.C. Cir. 1992) (union may "distribute questionnaires or conduct confidential face-to-face interviews" to obtain rating information about employees); Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d at 1303 (contact at workplace is alternative to disclosing home addresses of employees); Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1416 (Medical Society can have members send literature to their patients as alternative to disclosure of identities of all Medicare beneficiaries); Hemenway v. Hughes, 601 F. Supp. 1002, 1007 (D.D.C. 1985) (personal contact with individuals whose names and work addresses were released to plaintiff is alternative to agency releasing personal information he seeks); cf. Cotton v. Adams, 798 F. Supp. at 27 n.9 (suggesting that request for all Inspector General reports, from which identifying information could be redacted, would better serve public interest in overseeing discharge of Inspector General duties than does request for only two specific investigative reports involving known individuals).

[113] DOD v. FLRA, 964 F.2d at 29-30. But cf. FLRA v. United States Dep't of the Navy, 958 F.2d at 1497 (union's ability to approach employees at work place is not adequate alternative to disclosing home addresses).

against one another.[114] In other words, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.[115] In balancing these interests, "the 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure."[116] If the public benefit is weaker than the threat to privacy, the latter will prevail, and the information should be withheld.[117] The threat to privacy need not be obvious; it need only outweigh the public interest.[118]

Although "the presumption in favor of disclosure is as strong [under Exemption 6] as can be found anywhere in the Act,"[119] the courts have vigorously protected the personal, intimate details of an individual's life, the release of which is likely to cause distress or embarrassment. Courts regularly uphold the nondisclosure of information concerning marital status, legitimacy of children, welfare payments, family fights and reputation,[120] medical details and conditions,[121] date of birth,[122] religious affiliation,[123] citizenship,[124] social security account numbers,[125] criminal history records (most commonly

---

[114] Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

[115] Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); see FOIA Update, Spring 1989, at 7.

[116] Ripskis, 746 F.2d at 3.

[117] See FOIA Update, Spring 1989, at 6 (emphasizing possible applicability of Privacy Act disclosure prohibitions, particularly in light of Reporters Committee).

[118] See Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978).

[119] Washington Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

[120] See, e.g., Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974).

[121] See, e.g., id.; Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 23-24 (C.D. Cal. May 10, 1993).

[122] See, e.g., Centracchio v. FBI, No. 92-357, slip op. at 15 (D.D.C. Mar. 16, 1993).

[123] See, e.g., Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979).

[124] See, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985) ("Nationals from some countries face persistent discrimination . . . [and] are potential targets for terrorist attacks.").

[125] See, e.g., Rice v. Department of Transp., No. 91-3306, slip op. at 1 (D.D.C. Nov. 17, 1992); Fidelity Nat'l Title Ins. Co. v. HHS, No. 91-5484, slip op. at 6-7 (C.D. Cal. Feb. 13, 1992).

referred to as "rap sheets),"[126] incarceration of United States citizens in foreign prisons,[127] sexual inclinations or associations,[128] and financial status.[129] Even "favorable information," such as the details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy" among co-workers.[130] Moreover, release of such information "reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy."[131]

A subject which has generated extensive litigation and which warrants special discussion is requests for compilations of names and home addresses of individuals. Traditionally, prior to the Reporters Committee decision, the courts' analyses in "mailing list" cases turned on the requester's purpose, or the "use" to which the requested information was intended to be put. As noted before, many courts have held that requests made for the sole purpose of obtaining mailing lists for solicitation are purely commercial and consequently involve no public interest.[132] In those cases where "mailing list" requests were made for noncommercial purposes, however, the courts prior to Reporters Committee recognized a variety of public interest factors entitled to heavy and

---

[126] See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

[127] See Harbolt v. Department of State, 616 F.2d 772, 774 (5th Cir.), cert. denied, 449 U.S. 856 (1980).

[128] See, e.g., Siminoski v. FBI, No. 83-6499, slip op. at 28 (C.D. Cal. Jan. 16, 1990).

[129] See, e.g., Public Citizen, Inc. v. Resolution Trust Corp., No. 92-0010, slip op. at 6-10 (D.D.C. Mar. 19, 1993); Oklahoma Publishing Co. v. HUD, No. 87-1935, slip op. at 4 (W.D. Okla. June 17, 1988). But see Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 472 (W.D.N.Y. 1987) (ordering disclosure of information concerning recipients of disaster loans, including payment and default status).

[130] Ripskis v. HUD, 746 F.2d at 3; see HHS v. FLRA, No. 92-1012, slip op. at 2 (D.C. Cir. Dec. 10, 1992); FLRA v. United States Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992).

[131] FLRA v. United States Dep't of Commerce, 962 F.2d at 1059.

[132] See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1411 (9th Cir. 1987) (names and addresses of Medicare beneficiaries not disclosed to physicians' professional organization); Minnis v. United States Dep't of Agric., 737 F.2d 784, 788 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) (names and addresses of applicants for rafting permits not released to commercial establishment located on river); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (names and addresses of individuals licensed to produce wine at home for their own consumption not released to distributor of amateur wine-making equipment).

often dispositive weight.[133]

The Supreme Court in Reporters Committee, however, firmly repudiated any analysis based on either the identity, circumstances or intended purpose of the particular FOIA requester at hand.[134] Rather, it said, the analysis must turn on the nature of the document and its relationship to the basic purpose of the FOIA.[135] Following Reporters Committee, the Court of Appeals for the District of Columbia Circuit found that those cases relying on the stated "beneficial" purpose of the requester were grounded on the now-disapproved proposition that "Exemption 6 carries with it an implicit limitation that the information, once disclosed, [may] be used only by the requesting party and for the public interest purpose upon which the balancing was based."[136]

---

[133] See, e.g., Aronson v. HUD, 822 F.2d 182, 185-87 (1st Cir. 1987) (public interest in "the disbursement of funds the government owes its citizens" outweighs the privacy interest of such citizens to be free from others' attempts "to secure a share of that sum" when the government's efforts at disbursal are inadequate); Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984) (strong public interest in determining whether election fairly conducted), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985); Getman v. NLRB, 450 F.2d, 670, 675-76 (D.C. Cir. 1971) (public interest need for study of union elections held sufficient to warrant release to professor); Florida Rural Legal Servs., Inc. v. United States Dep't of Justice, No. 87-1264, slip op. at 6 (S.D. Fla. Feb. 10, 1988) (names and addresses of illegal aliens ordered disclosed so legal services group can inform them of citizenship registration requirement where INS not informing of such); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984) (names and addresses of veterans involved in atomic testing ordered disclosed because of public interest in increasing their knowledge of benefits and possible future health testing); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977) (nonprofit organization serving needs of retired military officers held entitled to names and addresses of such personnel), aff'd, 574 F.2d 636 (D.C. Cir. 1979) (table cite).

[134] See 489 U.S. at 771-72.

[135] Id. at 772; see also FOIA Update, Spring 1989, at 5-6 (old "use" test has been overruled and should no longer be followed).

[136] National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) [hereinafter NARFE]; see also Pennies From Heaven, Inc. v. Department of the Treasury, No. 88-1808, slip op. at 7-9 (D.D.C. Aug. 14, 1992) (withholding names and addresses of individuals who own United States treasury securities that are matured but unredeemed or on which interest is owed); Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., No. 90-1392, slip op. at 15 (D.D.C. Dec. 21, 1990) (denying access to names, social security numbers and addresses of individuals who have defaulted on government-backed student loans); Schoettle v. Kemp, 733 F. Supp. 1395, 1397-98 (D. Haw. 1990) (rely-
(continued...)

Because agencies may neither distinguish between requesters nor limit the use to which disclosed information is put, an analysis of the consequences of disclosure of a mailing list cannot turn on the identity or purpose of the requester.[137] Thus, it was found to be irrelevant in NARFE that the requester's purpose was to use the list of federal retirees to aid in its lobbying efforts on behalf of those retirees.[138] Although stopping short of creating a nondisclosure category encompassing all mailing lists, the D.C. Circuit in NARFE did hold that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.[139] Thus, though the issue is not yet finally settled, all mailing lists involving home addresses would appear to be well suited for "categorical" protection. (See discussion of home addresses of bargaining unit employees requested by unions under the Federal Service Labor-Management Relations Act, above.)

Another area which merits particular discussion is the applicability of Exemption 6 to requests for information about civilian and military federal employees. Generally, civilian employees' names, present and past position titles, grades, salaries and duty stations are releasable as no viable privacy interest exists in such data.[140] In addition, the Justice Department recommends the release of additional items, particularly those relating to professional qualifica-

---

[136](...continued)
ing upon both Reporters Committee's observation that "public interest" is not equivalent to "interesting or socially beneficial in some broad sense" and HUD's improved methods of tracing people to withhold identities of mortgagors eligible for distributions of money). But see Aronson v. HUD, No. 88-1524, slip op. at 1 (1st Cir. Apr. 6, 1989) (affirming award of attorney fees to plaintiff on basis that disclosure of list of mortgagors to whom HUD owes money sheds light on agency's performance of its duty to reimburse those mortgagors); Aronson v. IRS, 767 F. Supp. 378, 391-92 (D. Mass. 1991) (public interest in information concerning individuals who are owed tax refunds is related to basic purpose of FOIA, in this case "evaluating the efforts of the IRS to locate those owed refunds"), aff'd in part & rev'd in part on other grounds, 973 F.2d 962 (1st Cir. 1992).

[137] NARFE, 879 F.2d at 875.

[138] Id.; Center for Auto Safety v. National Highway Traffic Safety Admin., 809 F. Supp. 148, 150 (D.D.C. 1993) (requester's function as "significant consumer rights advocate" does not imply right to "take over the functions of NHTSA") (appeal pending).

[139] NARFE, 879 F.2d at 879; see also Retired Officers Ass'n v. Department of the Navy, No. 88-2054, slip op. at 3-4 (D.D.C. May 14, 1990) (upon reconsideration) (names and home addresses of retired military officers exempt); cf. Reed v. NLRB, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991) (categorically protecting "Excelsior" list [names and addresses of employees eligible to vote in union representation elections]), cert. denied, 112 S. Ct. 912 (1992).

[140] See 5 C.F.R. § 293.311 (1993); see also FOIA Update, Summer 1986, at 3.

tions for federal employment.[141]

Certain military personnel, though, are properly afforded greater privacy protection than other servicemen and nonmilitary employees. Courts have found that because of the threat of terrorism, servicemen stationed outside the United States have a greater expectation of privacy.[142] Courts have, however, ordered the release of names of military personnel stationed in the United States.[143] In addition, certain other federal employees such as law enforcement personnel possess, by virtue of the nature of their work, protectible privacy interests in their identities and work addresses.[144] (See also discussions of Exemption 2, above, and Exemption 7(C), below.)

Purely personal details pertaining to government employees are protectible under Exemption 6.[145] Indeed, courts generally have recognized the sen-

---

[141] See FOIA Update, Sept. 1982, at 3; see also Core v. United States Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984) (qualifications of successful federal applicants); Associated Gen. Contractors, Inc. v. United States, 488 F. Supp. 861, 863 (D. Nev. 1980) (education, former employment, academic achievements and employee qualifications).

[142] See Hudson v. Department of the Army, No. 86-1114, slip op. at 8-9 (D.D.C. Jan. 29, 1987) (finding threat of terrorism creates privacy interest in names, ranks and addresses of Army personnel stationed in Europe, Middle East and Africa), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (table cite); Falzone v. Department of the Navy, No. 85-3862, slip op. at 2-3 (D.D.C. Nov. 21, 1986) (finding same with respect to names and addresses of naval officers serving overseas or in classified, sensitive or readily deployable positions).

[143] See Hopkins v. Department of the Navy, No. 84-1868, slip op. at 4 (D.D.C. Feb. 5, 1985) (ordering disclosure of "names, ranks and official duty stations of servicemen stationed at Quantico" to life insurance salesman); Jafari v. Department of the Navy, 3 Gov't Disclosure Serv. (P-H) ¶ 83,250, at 84,014 (E.D. Va. May 11, 1983) (finding no privacy interest in "duty status" or attendance records of reserve military personnel) (Privacy Act "wrongful disclosure" suit), aff'd on other grounds, 728 F.2d 247 (4th Cir. 1984).

[144] See New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (Exemption 7(C)); Lesar v. United States Dep't of Justice, 636 F.2d 472, 487-88 (D.C. Cir. 1980) (same); see also FOIA Update, Summer 1986, at 3-4.

[145] See, e.g., American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932-33 (4th Cir. 1983) (employees' home addresses); Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023, 1028-30 (D.D.C. 1979) (medical, personnel and related documents of employees filing claims under Federal Employees Compensation Act); Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 463-64 (D.D.C. 1978) ("core" personal information, such as marital status or college grades). But see Washington Post Co. v. HHS, 690 F.2d at 258-65 (personal financial information required for appointment as HHS scientific consultant not exempt when (continued...)

sitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service.[146] In addition, the identities of persons who apply but are not selected for federal government employment may be protected.[147]

Similarly, the courts customarily have extended protection to the identities of mid- and low-level federal employees accused of misconduct, as well as to the details and results of any internal investigations into such allegations of

---

[145](...continued)
balanced against need for oversight of awarding of government grants); Husek v. IRS, No. 90-CV-923, slip op. at 1 (N.D.N.Y. Aug. 16, 1991) (citizenship, date of birth, educational background and veteran's preference of federal employees not exempt), aff'd, 956 F.2d 1161 (2d Cir. 1992) (table cite).

[146] See, e.g., Ripskis v. HUD, 746 F.2d at 3-4 (names and identifying data contained on evaluation forms of HUD employees who received outstanding performance ratings); Gilbey v. Department of the Interior, No. 89-801, slip op. at 3-4 (D.D.C. Oct. 22, 1990) (United States Park Police officer's job performance evaluations); Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 4-5 (D.D.C. Feb. 4, 1988) (identities of, and reasons why, Air Force officers not eligible for reassignment); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 862-63 (W.D. Pa. 1983) (FBI background investigation of Assistant U.S. Attorney); Rosenfeld v. HHS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,082, at 83,617 (D.D.C. Jan. 31, 1983) (names of those on proposed reduction-in-force list), aff'd on other grounds, No. 83-1341 (D.C. Cir. Nov. 11, 1983); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (studies of supervisors' performance and recommendations for performance awards), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,362-63 (D.D.C. Dec. 23, 1981) (forms reflecting supervisors' performance objectives and expectations); Information Acquisition Corp. v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,149, at 83,782-83 (D.D.C. Dec. 14, 1981) (FBI background investigation concerning federal judicial appointment); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 167-69 (D.D.C. 1976) (job performance evaluations, reasons for termination and affirmative action program reports), aff'd on other grounds sub nom. National Org. for Women v. Social Sec. Admin., 736 F.2d 727 (D.C. Cir. 1984); cf. Professional Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (resume data of proposed staff of government contract bidder).

[147] Core v. United States Postal Serv., 730 F.2d at 948-49 (protecting identities and qualifications of unsuccessful applicants for federal employment); Holland v. CIA, No. 91-1233, slip op. at 26-29 (D.D.C. Aug. 31, 1992) (protecting identity of person not selected as CIA General Counsel); Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 6-8 (D.D.C. July 31, 1989) (protecting identity of person not selected as receiver of failed bank).

impropriety.[148] The D.C. Circuit has reaffirmed this position in Dunkelberger v. Department of Justice.[149] It made very clear in Dunkelberger that, even post-Reporters Committee, the D.C. Circuit's decision in Stern v. FBI remains solid guidance for the balancing of the privacy interests of federal employees accused of wrongdoing against the public interest in shedding light on agency activities.[150]

In the early 1980's, a peculiar line of cases began to develop within the D.C. Circuit regarding the professional or business conduct of an individual. Specifically, the courts began to require the disclosure of information concerning an individual's business dealings with the federal government; indeed, even embarrassing information, if related to an individual's professional life, was

---

[148] See, e.g., Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984) (protecting identities of mid-level employees censured for negligence, but requiring disclosure of identity of high-level employee found guilty of serious, intentional misconduct) (Exemption 7(C)); Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir.) (names of disciplined IRS agents), cert. denied, 444 U.S. 842 (1979); Atkin v. EEOC, No. 91-2508, slip op. at 30-36 (D.N.J. July 14, 1993) (Inspector General's investigation of low-level employees of EEOC) (Exemption 7(C)); Cotton v. Adams, 798 F. Supp. 22, 25-28 (D.D.C. 1992) (report of Inspector General's investigation of low-level employees of Smithsonian Institution Museum Shops); Schonberger v. National Transp. Safety Bd., 508 F. Supp. 941, 944-45 (D.D.C. 1981) (results of complaint by employee against supervisor), aff'd, 672 F.2d 896 (D.C. Cir. 1981) (table cite); Iglesias v. CIA, 525 F. Supp. 547, 561 (D.D.C. 1981) (agency attorney's response to Office of Professional Responsibility misconduct allegations); cf. Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) ("extremely strong interest" in protecting privacy of individual who cooperated with internal investigation of possible criminal activity by fellow employees). But see McCutchen v. HHS, No. 91-142, slip op. at 7-12 (D.D.C. Aug. 24, 1992) (ordering disclosure of identities of both federally and privately employed scientists investigated for possible scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending); Gannett River States Publishing Corp. v. Bureau of the Nat'l Guard, No. J91-455, slip op. at 12-14 (S.D. Miss. Mar. 2, 1992) (given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

[149] 906 F.2d 779, 782 (D.C. Cir. 1990) (upholding FBI's refusal to confirm or deny existence of letters of reprimand or suspension for alleged misconduct by undercover agent) (Exemption 7(C)).

[150] See id. at 781; see also Beck v. Department of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (upholding agency's refusal to either confirm or deny existence of records concerning alleged wrongdoing of named DEA agents); Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (protecting contents of investigative file of nonsupervisory FBI agent accused of unsubstantiated misconduct).

subject to disclosure.[151] Similarly, the Court of Appeals for the Sixth Circuit has suggested that the disclosure of a document prepared by a government employee during the course of his employment "will not constitute a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate."[152]

It is quite significant, however, that in five later cases--Beck v. Department of Justice, Dunkelberger v. Department of Justice, Carter v. United States Department of Commerce, Stern v. FBI and Ripskis v. HUD--the D.C. Circuit, in reaching firm nondisclosure decisions, paid no heed to this consideration at all.[153] Moreover, under Reporters Committee, an individual doing business

---

[151] See, e.g., Sims v. CIA, 642 F.2d 562, 574 (D.C. Cir. 1980) (names of persons who conducted scientific and behavioral research under contracts with or funded by CIA); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 399-400 (D.C. Cir. 1980) (identities of trade sources who supplied information to CFTC); Cohen v. EPA, 575 F. Supp. 425, 430 (D.D.C. 1983) (names of suspected EPA "Superfund" violators) (Exemption 7(C)); Stern v. SBA, 516 F. Supp. 145, 149 (D.D.C. 1980) (names of agency personnel accused of discriminatory practices).

[152] Schell v. HHS, 843 F.2d 933, 939 (6th Cir. 1988); see also Kurzon v. HHS, 649 F.2d 65, 69 (1st Cir. 1981) (names and addresses of unsuccessful grant applicants to National Cancer Institute); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) ("disclosure [of names of State Department's officers and staff members involved in highly publicized case] merely establishes State employees' professional relationships or associates these employees with agency business").

[153] Beck v. Department of Justice, 997 F.2d at 1492 (where no evidence of wrongdoing exists, there is "no public interest to be balanced against the two [DEA] agents' obvious interest in the continued confidentiality of their personnel records"); Dunkelberger v. Department of Justice, 906 F.2d at 781-82 (recognizing that FBI agent has privacy interest in protecting his employment records against public disclosure); Carter v. United States Dep't of Commerce, 830 F.2d at 391-92 (withholding identities of private-sector attorneys subject to Patent and Trademark Office disciplinary investigations); Stern v. FBI, 737 F.2d at 91 (federal employees have privacy interest in information about their employment); Ripskis v. HUD, 746 F.2d at 3-4 ("substantial privacy interests" in performance appraisals of federal employees); see also Professional Review Org., Inc. v. HHS, 607 F. Supp. at 427 (finding protectible privacy interests in resumes of professional staff of successful government contract applicant sought by unsuccessful bidder); Hemenway v. Hughes, 601 F. Supp. at 1006 (citizenship information on journalists accredited to attend press briefings held protectible). But see Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 100-01 (D.C. Cir. 1988) (information relating to business judgments and decisions made during development of pharmaceutical not protectible under Exemption 7(C)); McCutchen v. HHS, slip op. at 7-12 (finding diminished privacy interest in professional activities in connection with allegations of scientific misconduct).

with the federal government certainly may have some protectible privacy interest, and such dealings with the government do not alone necessarily implicate a public interest that furthers the purpose of the FOIA.[154]

In applying Exemption 6, it must be remembered that all reasonably segregable, nonexempt portions of requested records must be released.[155] For example, in Department of the Air Force v. Rose, the Supreme Court ordered the release of case summaries of disciplinary proceedings, provided that personal identifying information was deleted.[156] Likewise, circuit courts of appeals have upheld the nondisclosure of the names and identifying information of employee-witnesses where disclosure would link each witness to a particular previously disclosed statement,[157] have ordered the disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional pharmacy after deletion of any item identifiable to a specific individual,[158] and have ordered the disclosure of documents concerning disciplined IRS employ-

---

[154] See 489 U.S. at 774 (information concerning a defense contractor, if such exists, would reveal nothing directly about the behavior of the Congressman with whom he allegedly dealt or about the conduct of the Department of Defense in awarding contracts to his company); accord Halloran v. VA, 874 F.2d 315, 324 (5th Cir. 1989) (public interest in learning about VA's relationship with its contractor is served by release of documents with redactions of identities of company employees suspected of fraud). But cf. Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 4-5 (D.D.C. July 31, 1989) (personal resume of appointed receiver of failed bank not protectible).

[155] See 5 U.S.C. § 552(b) (1988) (final sentence); see also Krikorian v. Department of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993) ("'The "segregability" requirement applies to all documents and all exemptions in the FOIA.'" (quoting Center for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984))) (Exemptions 1, 3 and 5).

[156] 425 U.S. at 380-81; see also FOIA Update, Winter 1986, at 6; cf. Ripskis v. HUD, 746 F.2d at 4 (agency voluntarily released outstanding performance rating forms with identifying information deleted); Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (agency ordered to protect employees' privacy in handwriting by typing records at requester's expense) (appeal pending).

[157] L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (Exemption 7(C)); cf. United States Dep't of State v. Ray, 112 S. Ct. 541, 548 (1991) (de minimis privacy invasion from release of personal information about unidentified person becomes significant when information is linked to particular individual).

[158] Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468-69 (D.C. Cir. 1983); cf. Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9 (W.D. Mo. Dec. 14, 1989) (urinalysis reports of air traffic controllers ordered disclosed with identities deleted).

ees, provided that all names and other identifying information were deleted.[159]

Nevertheless, in some situations the deletion of personal identifying information may not be adequate to provide privacy protection. It is significant in this regard that in Department of the Air Force v. Rose, the Supreme Court specifically admonished that if it were determined on remand that the deletions of personal references were not sufficient to safeguard privacy, the summaries of disciplinary hearings should not be released.[160]

Despite the admonition of the Supreme Court in Rose, though, two courts recently have permitted redaction only of information that directly identifies the individuals to whom it pertains. In ordering the disclosure of information pertaining to air traffic controllers who were reinstated in their jobs shortly after the 1982 strike, the Sixth Circuit held that only items that "by themselves" would identify the individual--names, present and pre-removal locations, and social security numbers--could be withheld.[161] It later modified its opinion to state that, although there might be instances in which an agency could justify the withholding of "information other than 'those items which "by themselves" would identify the individuals,'" the FAA in this case had "made no such particularized effort, relying generally on the claim that 'fragments of information' might be able to be pieced together into an identifiable set of circumstances."[162] Similarly, the District Court for the Northern District of California ordered the disclosure of application packages for candidates for an Air Force graduate degree program with the redaction of only the applicants' names, addresses and social security numbers.[163] Although the packets regularly contained detailed descriptions of the applicants' education, careers, projects and achievements, the court concluded that it could not "discern how there is anything more than a 'mere possibility' that [plaintiff] or others will be able to discern to which particular applicant each redacted application corresponds."[164]

The majority of courts, however, take a broader view of the redaction process. For example, to protect those persons who were the subjects of disciplinary actions which were later dismissed, the D.C. Circuit has upheld the nondisclosure of public information contained in such disciplinary files where

---

[159] Chamberlain v. Kurtz, 589 F.2d at 841-42; cf. Senate of P.R. v. Department of Justice, No. 84-1829, slip op. at 23 (D.D.C. Aug. 24, 1993) (information concerning cooperating inmate released after redaction of identifying details).

[160] 425 U.S. at 381.

[161] Norwood v. FAA, 993 F.2d 570, 575 (6th Cir.), modified, No. 92-5820 (6th Cir. July 9, 1993), reh'g denied (6th Cir. Aug. 12, 1993).

[162] Norwood v. FAA, No. 92-5820, slip op. at 1 (6th Cir. July 9, 1993).

[163] Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 2-5 (N.D. Cal. Mar. 24, 1993), reconsideration denied (N.D. Cal. Apr. 9, 1993), stay of disclosure order denied, No. 93-15672 (9th Cir. Apr. 28, 1993).

[164] Id. at 3.

the redaction of personal information would not be adequate to protect the privacy of the subjects because the requester could easily obtain and compare unredacted copies of the documents from public sources.[165] Likewise, when a FOIA request is by its very terms limited to privacy-sensitive information pertaining to an identified or identifiable individual, segregation is not possible.[166]

When a request is focused on records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to go a step further than withholding in full without segregation: It may be necessary to follow special "Glomarization" procedures to protect the "targeted" individual's privacy. If a request is formulated in such a way that even acknowledgment of the existence of responsive records would cause harm, then the subject's privacy can be protected only by refusing to confirm or deny that responsive records exist. This special procedure is a widely accepted method of protecting, for example, even the mere mention of a person in law enforcement records.[167] (For a more detailed explanation of such privacy "Glomarization," see the discussion of Exemption 7(C), below.)

This procedure is equally applicable to protect an individual's privacy

---

[165] Carter v. United States Dep't of Commerce, 830 F.2d at 391; see also, e.g., Marzen v. HHS, 825 F.2d 1148, 1152 (7th Cir. 1987) (redaction of "identifying characteristics" would not protect privacy of deceased infant's family because others could ascertain identity and "would learn the intimate details connected with the family's ordeal"); Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (mere deletion of names and other identifying data concerning small group of co-workers determined to be inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals) (Exemption 7(C)); Harry v. Department of the Army, No. 92-1654, slip op. at 9 (D.D.C. Sept. 13, 1993) (redaction of ROTC personnel records impossible because "intimate character" of ROTC corps at requester's university would make records recognizable to him); Frets v. Department of Transp., slip op. at 7 (disclosure of handwritten statements would identify those who came forward with information concerning drug use by air traffic controllers even if names were redacted); Singer v. Rourke, No. 87-1213, slip op. at 11 (D. Kan. Dec. 30, 1988) (given the particularity of the information and the parties' familiarity with each other, redaction would be impracticable and would not sufficiently protect identities).

[166] See, e.g., Hunt v. FBI, 972 F.2d at 288 ("public availability" of accused FBI agent's name does not defeat privacy protection and "would make redactions of [the agent's name in] the file a pointless exercise"); Cotton v. Adams, 798 F. Supp. at 27 (releasing any portion of documents would "abrogate the privacy interests" when request is for documents pertaining to two named individuals); Schonberger v. National Transp. Safety Bd., 508 F. Supp. at 945 (no segregation possible where request was for one employee's file).

[167] See, e.g., Dunkelberger v. Department of Justice, 906 F.2d at 782; Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983), cert. denied, 467 U.S. 1210 (1984); see also FOIA Update, Winter 1986, at 3.

interest in sensitive non-law enforcement records.[168] For example, many agencies maintain an Employee Assistance Program for their employees, operating it on a confidential basis in which privacy is assured. An agency would release neither a list of the employees who participate in such a program nor any other information concerning the program without redacting the names of participants. Logically, then, in responding to a request for any employee assistance counseling records pertaining to a named employee, the agency could protect the privacy of that individual only by refusing to confirm or deny the existence of responsive records.

Similarly, the "Glomarization" approach would be appropriate in responding to a request targeting such matters as a particular citizen's welfare records or the disciplinary records of an employee accused of relatively minor misconduct.[169] Generally, this approach is proper whenever mere acknowledgment of the existence of records would be tantamount to disclosing an actual record the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy."[170] It must be remembered, however, that this response is effective only so long as it is given consistently for a distinct category of requests.[171] If it were to become known that an agency gave a "Glomarization" response only when records do exist and a "no records" response otherwise, the purpose of this special approach would be defeated.[172]

## EXEMPTION 7

Exemption 7 of the FOIA, as amended, protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could

---

[168] See FOIA Update, Spring 1986, at 2.

[169] See Beck v. Department of Justice, 997 F.2d at 1493 (refusing to confirm or deny existence of disciplinary records pertaining to named DEA agents) (Exemptions 6 and 7(C)); Dunkelberger v. Department of Justice, 906 F.2d at 782 (refusal to confirm or deny existence of letter of reprimand or suspension of FBI agent) (Exemption 7(C)); Cotton v. Adams, 798 F. Supp. at 26 n.8 (suggesting that "the better course would have been for the Government to refuse to confirm or deny the existence of responsive materials"); Ray v. United States Dep't of Justice, 778 F. Supp. 1212, 1213-15 (S.D. Fla. 1991) (upholding INS's refusal to confirm or deny existence of investigative records concerning INS officer) (Exemptions 6 and 7(C)).

[170] See FOIA Update, Spring 1986, at 2; see also Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982) (dicta) (upholding agency's refusal to confirm or deny existence of records pertaining to plaintiff's former attorney), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (table cite).

[171] See FOIA Update, Winter 1986, at 3.

[172] See id.

reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."[1]

As originally enacted, this exemption permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[2] As such, it was consistently construed to exempt all material contained in an investigatory file, regardless of the status of the underlying investigation or the nature of the documents requested.[3] In 1974, Congress rejected the application of a "blanket" exemption for investigatory files and narrowed the scope of Exemption 7 by requiring that withholding be justified by one of six specified types of harm. Under this revised Exemption 7 structure, an analysis of whether a record was protected by this exemption involved two steps. First, the record had to qualify as an "investigatory record compiled for law enforcement purposes." Second, its disclosure had to be found to threaten one of the enumerated harms of Exemption 7's six subparts.[4]

In 1986, after many years of administrative and legislative consideration of the need for FOIA reform legislation, Congress amended Exemption 7 once again, retaining its basic structure as established by the 1974 FOIA amendments, but significantly broadening the protection given to law enforcement records virtually throughout the exemption and its subparts.[5] The Freedom of In-

---

[1] 5 U.S.C. § 552(b)(7) (1988).

[2] 5 U.S.C. § 552(b)(7) (1970) (amended 1974 and 1986).

[3] See, e.g., Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1198-1202 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

[4] See FBI v. Abramson, 456 U.S. 615, 622 (1982).

[5] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (shift from "would constitute" standard to "could reasonably be expected to constitute" standard "represents a congressional effort to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]"); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) ("The 1986 amendment broadened the scope of exemption 7's threshold requirement . . . ."), cert. denied, 497 U.S. 1010 (1990); Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 22 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (holding that record created by (continued...)

formation Reform Act of 1986 modified the existing threshold requirement of Exemption 7 in several distinct respects. It deleted the word "investigatory" and added the words "or information," such that Exemption 7 protections are now potentially available to all "records or information compiled for law enforcement purposes."[6] And, except for Exemption 7(B) and part of Exemption 7(E), it altered the requirement that an agency demonstrate that disclosure "would" cause the harm each subsection seeks to prevent, to the lesser standard that disclosure "could reasonably be expected to" cause the specified harm.[7]

The most technical of these language modifications is the expansion of the exemption to cover "information" compiled for law enforcement purposes. This modification, by its terms, permits Exemption 7 to apply not only to compilations of information as they are preserved in particular records requested, but also to any information within the record itself, so long as that information was compiled for law enforcement purposes.[8] It plainly was designed "to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained."[9] It was intended to avoid use of any mechanical process for determining the purpose for which a physical record was created and to instead establish a focus on the purpose for which information contained in a record has been generated.[10] In making their determinations of threshold Exemption 7 applicability, agencies should now focus on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which it happens to be maintained.[11]

The amendment altering the unit of focus under Exemption 7 from a "record" to an item of "information" builds upon the approach to Exemption 7's threshold that was employed by the Supreme Court in FBI v. Abramson,[12] in which the Court pragmatically focused on the "kind of information" contained

---

[5](...continued)
nongovernmental entity independent of Department's investigation but later compiled for that investigation satisfied threshold of Exemption 7 as "broadened" by 1986 amendments and noting that an "[a]gency's burden of proof in this threshold test has been lightened considerably"), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

[6] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

[7] Id.; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-13 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[8] Attorney General's Memorandum at 5.

[9] S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983).

[10] See id.

[11] Id.

[12] 456 U.S. at 626.

in the law enforcement records before it. The amendment essentially codifies prior judicial determinations that an item of information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record.[13] This properly places "emphasis on the contents, and not the physical format of documents."[14]

A particularly difficult "compilation" issue has finally been put to rest by the Supreme Court. In resolving whether information which the government did not initially obtain or generate for law enforcement purposes that subsequently was compiled for a valid law enforcement purpose qualifies for Exemption 7 protection, an issue in which lower court decisions were in conflict,[15] the Supreme Court decisively held that the "compilation for law enforcement purposes" need not occur at the time the information was created, but merely must occur prior to "when the Government invokes the Exemption."[16] In rejecting the distinction between documents originally compiled or obtained for law enforcement purposes and those later assembled for such purposes, the Court held that the term "compiled" must be accorded its ordinary meaning--which includes "materials collected and assembled from various

---

[13] See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980).

[14] Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 590 (D.D.C. 1983) (applying Abramson to hold duplicate copy of congressional record maintained in agency files is not an "agency record"); see also, e.g., ISC Group v. DOD, No. 88-631, slip op. at 13 (D.D.C. May 22, 1989) (failure to protect investigatory report prepared by private company expressly for agency criminal investigation pursuant to Exemption 7 "would elevate form over substance and frustrate the purpose of the exemption"); cf. In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988) (law enforcement privilege protects testimony about contents of files which would themselves be protected, because public interest in safeguarding ongoing investigations is identical in both situations).

[15] Compare Crowell & Moring v. DOD, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989) (solicitation and contract bids protected) and Gould Inc. v. GSA, 688 F. Supp. 688, 691 (D.D.C. 1988) (routine audit reports protected) with John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (routine audit reports not protected), rev'd & remanded, 493 U.S. 146 (1989), reh'g denied, 493 U.S. 1064 (1990) and Hatcher v. United States Postal Serv., 556 F. Supp. 331, 335 (D.D.C. 1982) (routine contract negotiation and oversight material not protected).

[16] John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989), reh'g denied, 493 U.S. 1064 (1990); see also KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (applying John Doe Agency to hold that information regarding personnel interview conducted before investigation commenced and later recompiled for law enforcement purposes satisfied Exemption 7 threshold); Africa Fund v. Mosbacher, No. 92-289, slip op. at 9 (S.D.N.Y. May 26, 1993) (applying John Doe Agency to hold "original purpose for which the documents were collected is irrelevant to Exemption 7(A)").

sources or other documents"--and it found that the plain meaning of the statute contains "no requirement that the compilation be effected at a specific time."[17]

A considerably greater expansion of Exemption 7's scope results from the FOIA Reform Act's removal of the requirement that records or information be "investigatory" in character in order to qualify for Exemption 7 protection.[18] Under the former formulations, agencies and courts considering Exemption 7 issues often found themselves struggling with the "investigatory" requirement, which held the potential of disqualifying sensitive law enforcement information from Exemption 7 protection. Courts construing this statutory term generally interpreted it as requiring that the records in question result from specifically focused law enforcement inquiries as opposed to more routine monitoring or oversight of government programs.[19]

The distinction between "investigatory" and "noninvestigatory" law enforcement records, however, was not always so clear.[20] Moreover, the "investigatory" requirement per se was frequently blurred together with the "law enforcement purposes" aspect of the exemption, so that it sometimes became difficult to distinguish between the two.[21] Law enforcement manuals containing sensitive information about specific procedures and guidelines followed by an agency were held not to qualify as "investigatory records" because they had not originated in connection with any specific investigation, even though they clearly had been compiled for law enforcement purposes.[22]

By eliminating the "investigatory" requirement under Exemption 7, the FOIA Reform Act should put an end to such troublesome distinctions and

---

[17] John Doe Agency v. John Doe Corp., 493 U.S. at 153.

[18] Attorney General's Memorandum at 6.

[19] Compare, e.g., Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (records submitted for mere monitoring of employment discrimination found not "investigatory") with Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (records of agency review of public schools suspected of discriminatory practices found "investigatory").

[20] Compare, e.g., Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979) (bank examination report "typifies routine oversight" and thus is not "investigatory"), rev'd on other grounds, 631 F.2d 896 (D.C. Cir. 1980) with Copus v. Rougeau, 504 F. Supp. 534, 538 (D.D.C. 1980) (compliance review forecast report "clearly" an investigative record).

[21] See, e.g., Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d 73, 81 & n.47 (D.C. Cir. 1974).

[22] See Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual that "was not compiled in the course of a specific investigation"); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978) (same).

broaden the potential sweep of the exemption's coverage.[23] The protections of Exemption 7's six subparts are now available to all records or information that have been compiled for "law enforcement purposes."[24] Even records generated pursuant to routine agency activities that could never be regarded as "investigatory" now qualify for Exemption 7 protection where those activities involve a law enforcement purpose. This includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations. Records such as law enforcement manuals, for example, which previously were found unqualified for Exemption 7 protection only because they were not "investigatory" in character,[25] now should readily satisfy the exemption's revised threshold requirement.[26] The sole issue thus remaining is the application of the phrase "law enforcement purposes" in the context of the amended Exemption 7.

Although there is still relatively little case law under the 1986 FOIA amendments addressing the parameters of this new, less demanding threshold standard of Exemption 7, it is useful to examine the cases interpreting the identical "law enforcement purposes" language under the prior version of this exemption, as all law enforcement records found qualified for exemption protection under the pre-1986 language of Exemption 7 undoubtedly remain so.[27] The "law" to be enforced within the meaning of "law enforcement purposes"

---

[23] Attorney General's Memorandum at 7.

[24] Id.

[25] See, e.g., Sladek v. Bensinger, 605 F.2d at 903; Cox v. United States Dep't of Justice, 576 F.2d at 1310.

[26] Attorney General's Memorandum at 7; see also, e.g., Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 14-15 (D.D.C. Dec. 19, 1990) (documents which relate to INS's law enforcement procedures meet threshold requirement as "purpose in preparing these documents relat[es] to legitimate concerns that federal immigration laws have been or may be violated"). But see Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 533 (D.D.C. 1992) (threshold not met by Bureau of Prisons' guidelines covering how prison officials should count and inspect prisoners).

[27] See Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 80-82 (threshold of Exemption 7 met if investigation focuses directly on specific illegal acts which could result in civil or criminal penalties); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (based upon pre-1986 language, Service Lookout Book used to assist in exclusion of inadmissible aliens found to satisfy threshold requirement); U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 4 (D.D.C. Mar. 26, 1986) (records pertaining to acquisition of two armored limousines for President meet threshold test; activities involved investigation of how best to safeguard President); Nader v. ICC, No. 82-1037, slip op. at 10-11 (D.D.C. Nov. 23, 1983) (disbarment proceeding meets Exemption 7 threshold because it is "quasi-criminal" in nature).